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Supreme Court, U.S.
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In The

Supreme Court of the United States

AMERICAN RENOVATION AND CONSTRUCTION COMPANY,

Petitioner,

v.

BILL FAVEL, JOHN PITZER, JOE LaMERE, TOBY LaMERE, and ALVIN BELGARDE,

Respondents.

On Petition For A Writ Of Certiorari To The Montana Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May laborers on a federal construction project who complain they were not paid prevailing wages under the Davis-Bacon Act circumvent the exclusive remedies provided by Congress and privately enforce the Act by bringing a state common law claim in state district court against the contractor for alleged violation of the Act, the result of which will be that state court judges and juries will make the complex wage determinations that Congress has declared must be decided by the Department of Labor?

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

All parties to the proceeding below are listed in the caption. Petitioner American Renovation and Construction Company does not have a parent corporation nor does any publicly held company own 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

American Renovation and Construction Company ("ARC") respectfully requests this Court issue a writ of certiorari to review the opinion and judgment of the Montana Supreme Court issued November 26, 2002.

OPINIONS BELOW

The Montana Supreme Court is the court of last resort in Montana. The Court filed its Opinion on November 26, 2002, reported at *Favel v. American Renovation & Construction Co.*, 2002 MT 266, 312 Mont. 285, 59 P.3d 412 (2002). (App. 1-45). The Montana Eighth Judicial District Court, Cascade County, filed its unreported order granting ARC's Motion to Dismiss on June 12, 2001. (App. 46-51).

In a companion case brought by the same Plaintiffs in federal court, the United States District Court for the District of Montana, Great Falls Division, filed its unreported order denying ARC's Motion to Dismiss and staying the action pending a Davis-Bacon determination by the Department of Labor on February 1, 2001, reported at *Favel v. St. Paul Fire & Marine Ins. Co.*, No. CV-99-60-RFC-GF, 2001 WL 92149 (D. Mont. Feb. 1, 2001). (App. 52-58).

JURISDICTION

The Montana Supreme Court issued its Opinion on November 26, 2002. ARC was not required to, and did not, file a Motion for Rehearing. Accordingly, the Petition for Writ of Certiorari is due no later than February 24, 2003.

ARC invokes this Court's jurisdiction pursuant to 28 U.S.C.A. § 1257.

RELEVANT STATUTES

The complete text of the relevant statutes is set out verbatim in the Appendix. (App. 70-77). Section 1 of the Davis-Bacon Act provides that the advertised specifications for every contract in excess of $2000 to which the United States is a party for the construction, alteration and/or repair of public buildings:

> [S]hall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State in which the work is to be performed. . . .

40 U.S.C.A. § 276a(a). Section 1 also requires that each federal contract "shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed . . . the full amounts . . . computed at wage rates not less than stated in the advertised specifications." *Id.*

The Davis-Bacon Act sets forth a detailed administrative enforcement scheme. Section 1 provides that:

> [T]here may be withheld from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor

> or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics. . . .

40 U.S.C.A. § 276a(a).

Section 3 of the Davis-Bacon Act authorizes the Comptroller General of the United States to "pay directly to laborers and mechanics from any accrued payments withheld under the terms of the contract any wages found to be due laborers and mechanics pursuant to sections 276a to 276a-5 of this title. . . . " 40 U.S.C.A. § 276a-2(a). Section 3 further provides that:

> If the accrued payments withheld under the terms of the contract . . . are insufficient to reimburse all of the laborers and mechanics, with respect to whom there has been a failure to pay the wages required pursuant to sections 276a to 276a-5 of this title, such laborers and mechanics shall have the right of action and/or intervention against the contractor and his sureties conferred by law upon persons furnishing labor and materials. . . .

40 U.S.C.A. § 276a-2(b).

The rights of persons furnishing labor or material to pursue bond claims are defined in 40 U.S.C.A. § 270b, known as the Miller Act:

> Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under sections 270a to 270d of this title and who has not been paid in full therefor before the expiration of a period of ninety

> days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit. . . .

40 U.S.C.A. § 270b.

Section 270a of the Miller Act requires that:

> [B]efore any contract for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States . . . a payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and materials in the prosecution of the work provided for in said contract for the use of each such person.

40 U.S.C.A. § 270a(a)(2).

The Secretary of Labor has issued detailed regulations designed to implement the Davis-Bacon Act. The regulations pertinent to this case are set out verbatim in the Appendix. (App. 78-96).

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND.

At the heart of this case is a contract entered into in March of 1998 by the United States Air Force ("United States") and ARC for construction of military family housing at Malmstrom Air Force Base located in Great

Falls, Montana. The contract contains a provision requiring ARC to pay its laborers prevailing wages under the Davis-Bacon Act. ARC entered into subcontracts with Baer Construction and Four Winds Construction. The subcontracts also contained provisions requiring the subcontractors to pay their employees prevailing wages. Plaintiffs ("workers") contend they were not paid prevailing wages under the Davis-Bacon Act as required by the contract between ARC and the United States and by the contracts between ARC and its subcontractors.

II. PROCEDURAL HISTORY AND PRESENTATION AND PRESERVATION OF FEDERAL QUESTION.

A. The Companion Case in Federal District Court.

On June 21, 1999, the workers filed suit in Montana federal district court against ARC and St. Paul Fire & Marine Insurance Company ("St. Paul"), ARC's surety. The workers invoked the Miller Act as the basis for federal jurisdiction. The workers alleged that: (1) they were the intended beneficiaries of the contract between ARC and the United States and that ARC breached the contract because they were misclassified and not paid appropriate Davis-Bacon wages; and (2) they were wrongfully discharged for complaining they were not being paid Davis-Bacon wages.

ARC moved to dismiss the workers' complaint for lack of subject matter jurisdiction. ARC argued that although the workers alleged their action was premised upon the Miller Act, the workers' claims were based only upon alleged violations of the Davis-Bacon Act. ARC contended

that the workers' federal court action was premature because they had not first brought the wage dispute before the Department of Labor as required by the federal regulations implementing the Davis-Bacon Act. Relying upon federal case law, ARC argued the workers could not sustain their action because section 1 of the Davis-Bacon Act does not provide for a private cause of action.

In an order dated February 1, 2001, the Honorable Richard F. Cebull agreed with ARC that all of the workers' claims were premised on alleged violations of the Davis-Bacon Act. (App. 54). Judge Cebull held that "the import of this is that the Davis-Bacon Act does not provide for a private right of action under the circumstances provided here – at least not at this time." (App. 54). Judge Cebull then found that the workers were entitled to bring a claim against ARC and St. Paul under the Miller Act. (App. 55-56). However, Judge Cebull noted that the workers had not pursued their administrative remedies, which are a condition precedent to filing a claim in federal district court under the Miller Act. (App. 56). Judge Cebull stayed the action to allow the workers to pursue their administrative remedies by obtaining Department of Labor determinations regarding whether Davis-Bacon Act violations occurred, the extent of such violations, and whether the payments to ARC withheld by the United States were sufficient to compensate the workers. (App. 58).

After Judge Cebull issued his order, the workers voluntarily dismissed their action in federal district court.

B. The Proceedings in State District Court.

On October 16, 1999, the workers filed an action in Montana state district court, naming ARC as the only Defendant. Unlike the federal case, the workers did not sue the surety. The workers' allegations are nearly identical to their allegations in the federal district court action except the workers additionally allege that ARC was negligent in failing to pay them Davis-Bacon wages and that ARC acted with malice by not paying them Davis-Bacon wages. (App. 59-69). Their complaint also contains a private attorney general/common fund claim.

ARC moved to dismiss the workers' state court action for lack of subject matter jurisdiction. ARC again argued that the workers' claims are based only upon alleged violation of the Davis-Bacon Act and that the action was premature because the workers had not first brought the dispute before the Department of Labor as required by the federal regulations. Relying upon federal case law, ARC also contended that the state court did not have jurisdiction over the workers' claims because they were premised on the Davis-Bacon Act, which did not confer a private right of action on aggrieved employees. Finally, ARC argued that the workers' remedy lay in a Miller Act claim against ARC's surety and that the workers had failed to pursue such a claim by first initiating their administrative remedies before the Department of Labor and then, if necessary, pursuing a Miller Act claim in federal district court.

On June 12, 2001, Judge Julie Macek granted ARC's motion to dismiss for lack of subject matter jurisdiction. (App. 51). Judge Macek applied the four-part test for a private right of action delineated by this Court in *Cort v.*

Ash, 422 U.S. 66, 78 (1975), and concluded that the Davis-Bacon Act does not provide for such a claim. (App. 49-50). Judge Macek also recognized that the workers had a potential Miller Act claim against St. Paul, and accordingly dismissed the workers' complaint without prejudice to allow the workers to obtain Department of Labor determinations and to name St. Paul as a defendant if they felt a Miller Act claim existed. (App. 50-51).

C. The Proceedings in the Montana Supreme Court.

The workers timely appealed the state district court's order of dismissal to the Montana Supreme Court. On appeal, ARC argued that despite the fact the workers styled their wage claims as state "common law" claims, the claims are based only upon alleged violations of the Davis-Bacon Act. ARC asserted the workers' action is one to privately enforce the Davis-Bacon Act and that a private right of action does not exist under the Act. ARC also contended the workers' argument that the Davis-Bacon Act does not preempt state common law claims is misplaced because there is no conflicting or competing state law which would trigger a preemption analysis.

The Montana Supreme Court reversed the district court's order dismissing the workers' action. (App. 31). The court stated that it "declined to consider" whether the workers have a private right of action under the Davis-Bacon Act. (App. 29). Instead, even though the state court's order does not address the issue of preemption, the Montana Supreme Court held that the state court has subject matter jurisdiction over the workers' action because the Davis-Bacon Act does not preempt the workers'

state common law claims. (App. 27-28). The Montana Supreme Court remanded the case to the state district court and allowed the workers to proceed with their common law breach of contract claim against ARC. (App. 31).

REASONS FOR GRANTING THE WRIT

The impact of the Montana Supreme Court's decision is significant. The decision allows federal laborers to completely side-step the administrative process set forth in the Davis-Bacon Act and the federal regulations implementing the Act. The decision allows laborers to circumvent the remedies crafted by Congress and contained in the Davis-Bacon Act, the Miller Act, and the regulations implementing the Acts. Under the decision, laborers need not obtain Department of Labor determinations that Davis-Bacon violations have occurred or that the funds withheld by the contracting officer are insufficient to reimburse the laborers for back wages. Instead, laborers may proceed directly to state court and file state common law claims against the contractor, and state district court judges and juries will decide the complex wage determinations that Congress has declared are within the exclusive jurisdiction of the Department of Labor. Additionally, laborers may name the contractor as the only defendant, leaving the contractor without the protection of the payment bond it was required by federal law to procure to cover the payment of back wages in the event of a wage dispute.

The Montana Supreme Court's decision on an important federal question conflicts with the decisions of at least

four circuit courts of appeals and at least one state court of last resort. The Montana Supreme Court also decided an important question of federal law which this Court expressly declined to settle in *Universities Research Ass'n, Inc. v. Coutu*, 450 U.S. 754 (1981). Further, the court decided the question in a way that is inconsistent with the guidance provided by this Court in *Coutu*.

I. THE MONTANA SUPREME COURT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH DECISIONS OF AT LEAST FOUR CIRCUIT COURTS OF APPEALS AND AT LEAST ONE STATE COURT OF LAST RESORT.

A. The Montana Supreme Court's decision conflicts with decisions of the Second, Third, Fifth, and Ninth Circuits.

The result of the Montana Supreme Court's decision, that laborers may bring state common law claims to remedy alleged violations of the Davis-Bacon Act, is in direct conflict with decisions of the Second, Third, Fifth, and Ninth Circuits. Well-reasoned and persuasive decisions from each of these circuits affirmatively hold that the Davis-Bacon Act does not provide a private right of action.

The Second Circuit addressed a factual situation nearly identical to that presented to the Montana Supreme Court in *Grochowski v. Phoenix Construction*, ___ F.3d ___, No. 01-7569, 2003 WL 115712 (2d Cir. Jan. 14, 2003). The plaintiffs were bricklayers and roofers who worked on three public works construction projects governed by contracts which contained provisions for Davis-Bacon wages. The plaintiffs brought suit against the

contractors and their sureties to recover back wages under New York State common law. The plaintiffs alleged that they were third party beneficiaries of the federal contract and that the contractor breached the contract by failing to pay them prevailing wages. They also asserted a quantum meruit claim. The district court dismissed the plaintiffs' state common law claims on the basis that state common law remedies were not available to recover prevailing wages under federally funded contracts. *Grochowski*, 2003 WL 115712, at * 2.

The Second Circuit affirmed the district court's decision. *Id.*, 2003 WL 115712, at * 4. The court noted that its decision in *Chan v. City of New York*, 1 F.3d 96 (2d Cir. 1993), indicates that no private right of action exists under the Davis-Bacon Act. *Id.*, 2003 WL 115712, at * 3. The Second Circuit thus decided:

> [T]he plaintiffs' state-law claims are indirect attempts at privately enforcing the prevailing wage schedules contained in the DBA [Davis-Bacon Act]. To allow a third-party private contract action aimed at enforcing those wage schedules would be "inconsistent with the underlying purpose of the legislative scheme and would interfere with the implementation of that scheme to the same extent as would a cause of action directly under the statute."

Id., 2003 WL 115712, at *4 (quoting *Davis v. United Air Lines, Inc.*, 575 F.Supp. 677, 680 (E.D.N.Y. 1983)). The court concluded that the plaintiffs' efforts to bring their claims for back wages under the Davis-Bacon Act as state common law claims were "clearly an impermissible 'end run' around the DBA." *Id.*

The other circuit courts which have addressed the question, with the exception of the Seventh Circuit, have similarly held that the Davis-Bacon Act does not confer on laborers a private right of action for alleged unpaid or underpaid prevailing wages. The Ninth Circuit in *Operating Eng'rs Health & Welfare Trust Fund v. JWJ Contracting Co.*, 135 F.3d 671, 676 (9th Cir. 1998) affirmed a district court's order granting summary judgment to a surety in an action brought for prevailing Davis-Bacon wages because no private right of action exists under the Act. The Third Circuit in *Weber v. Heat Control Co.*, 728 F.2d 599, 600 (3d Cir. 1984), held that a district court did not err by granting summary judgment to a defendant contractor on plaintiff's action for back wages on the basis plaintiff was not possessed of a private right of action under the Davis-Bacon Act. Similarly the Fifth Circuit in *United States v. Capeletti Bros., Inc.*, 621 F.2d 1309, 1317 (5th Cir. 1980) decided that no implied private right of action exists under the Davis-Bacon Act and therefore the district court properly dismissed plaintiffs' claims that they had been misclassified by their employers and as a result had not been paid prevailing wages. The Seventh Circuit in *McDaniel v. University of Chicago*, 548 F.2d 689, 695 (7th Cir. 1977), is the only court of appeals that has held an implied private right of action does exist. In a later opinion, however, the Seventh Circuit, in *Simpson v. Reynolds Metal Co.*, 629 F.2d 1226 (7th Cir. 1980), cast doubt upon its holding in *McDaniel* by noting it decided that case without the guidance of this Court's decision in *Cannon v. University of Chicago*, 441 U.S. 677 (1979). *Simpson*, 629 F.2d at 1240 n.27.

The Montana Supreme Court's decision conflicts with decisions from the Second, Third, Fifth and Ninth Circuits.

The Montana Supreme Court's decision also illustrates a dispute between the decisions of these four circuits and that of the Seventh Circuit. The Court should grant ARC's petition for writ of certiorari to address this conflict over an important question of federal law.

B. The Montana Supreme Court's decision conflicts with a decision by the Arkansas Supreme Court.

The Montana Supreme Court's conclusion that the state district court has subject matter jurisdiction over the workers' state common law claim based on alleged violations of the Davis-Bacon Act also conflicts with a decision of the Arkansas Supreme Court, *Davis v. Hardaway Contracting Co.*, 386 S.W.2d 707 (Ark. 1965). In *Davis*, the plaintiffs performed labor and services for subcontractors on a federal project under a contract which provided for Davis-Bacon wages. The plaintiffs brought an action in state court, alleging the subcontractors misclassified them and thus failed to pay them appropriate Davis-Bacon wages. The district court dismissed the plaintiffs' action for lack of jurisdiction on the basis that the classification of laborers is an issue to be determined by the Department of Labor. *Davis*, 286 S.W.2d at 708.

The Arkansas Supreme Court affirmed. *Id.*, at 710. The court noted that under the relevant federal regulations, disputes regarding classifications of workers are to be resolved by the Secretary of Labor. *Id.*, at 708. The court also recognized that under the regulations, the federal contracting agency is required to investigate and insure compliance with labor standard stipulations, and that the regulations provided for contractor penalties for

not complying with such stipulations. *Id.*, at 709. The court concluded:

> It is apparent that these regulations are comprehensive, and are designed to afford relief to aggrieved laborers. The Davis-Bacon Act itself (Sections 276a to 276a-5 of Title 40 U.S.C.A.) also sets out remedies for laborers who have been paid less wages than the rate (of wages) required to be paid under a contract. We are persuaded that this act, together with the rules and regulations promulgated, and heretofore set out (Title 29, Subtitle A, Part 5), provides full and complete relief, and state courts are without jurisdiction to entertain the type of litigation here under discussion.

Id.

The Montana Supreme Court reached the opposite result of the Arkansas Supreme Court by concluding that the state district court had jurisdiction over the workers' state common law breach of contract claim based solely on alleged violations of the federal Davis-Bacon Act. This Court should grant this petition in order to resolve the conflict between the two state courts of last resort regarding this important issue of federal law.

II. THE MONTANA SUPREME COURT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH THE GUIDANCE PROVIDED BY THIS COURT IN *UNIVERSITIES RESEARCH ASS'N v. COUTU.*

In *Universities Research Ass'n, Inc. v. Coutu*, 450 U.S. 754 (1981), this Court expressly declined to do what the Montana Supreme Court's decision has done. In *Coutu*, an

employee of a federal contractor brought suit in federal court claiming the contractor violated the Davis-Bacon Act by failing to pay prevailing wages for work performed under a federal contract. The federal contract in question did not contain a stipulation requiring the contractor to pay Davis-Bacon wages and the contract was administratively determined not to call for Davis-Bacon work. On appeal to this Court, the contractor argued that Congress did not intend that the Davis-Bacon Act be enforced through private action.

This Court held that the Davis-Bacon Act does not confer a private right of action for back wages under a contract that is administratively determined not to call for Davis-Bacon work. *Coutu*, 450 U.S. at 767-768. Although the Court found it unnecessary to reach the "broader" issue of whether the Act creates an implied private right of action to enforce a contract that does contain Davis-Bacon Act stipulations,[1] it affirmatively recognized that "some of our reasoning arguably applies to the question whether the Act creates any implied right of action." *Id.*, at 769 n.19.

This Court turned first to the language of the Davis-Bacon Act. It explained that although its previous opinions recognize that the Act was designed for the benefit of construction workers, the question remains whether the

[1] In declining to decide the issue of whether an implied private right of action exists under a contract containing Davis-Bacon stipulations, this Court also noted that it is questionable whether the issue was properly before it in light of counsel's comments at oral argument that they had not directly raised the issue in the Seventh Circuit. *Coutu*, 450 U.S. at 769 n.19.

language of the statute indicates Congress intended it to be enforced through private litigation. *Id.*, at 771. The Court noted that section 1 of the Act requires that certain stipulations be placed in federal contracts for the benefit of laborers but does not confer rights directly on those individuals. *Id.*, at 772. The Court found since section 1 of the Act is "simply 'phrased as a directive to federal agencies engaged in the disbursement of federal funds,'" its language provides no support for the implication of a private remedy. *Id.*, at 772-773 (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 693 (1979)).

The Court then considered the import of section 3 of the Act, conferring on laborers the same "right of action and/or intervention" conferred by the Miller Act if the wages withheld by the contracting agency under section 1 were insufficient to reimburse the laborers. *Coutu,* 450 U.S. at 773. The Court states in a footnote:

> The Court has observed that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. (citation omitted). There is some evidence that Congress intended the suit on the contractor's bond to be the sole method of enforcing the obligations imposed by the Act.

Id. at 773 n.24.

Finally, the Court considered the legislative history of the Act. It explained that the Act does not contain any provision for predetermination of prevailing wages by the Secretary or any enforcement provision until 1935. *Id.*, at 774-775. The Court stated that in adopting the two provisions, the intent of Congress was to make it easier for contractors to know in advance what their labor costs

would be before submitting a bid, and to give laborers and mechanics only the same right of action against a contractor and its sureties in court which was then allowed by the Heard Act, the precursor to the Miller Act. *Id.*, at 776-777 n.27. The Court noted that "[t]o imply a private right of action here would be to defeat each of these congressional objectives." *Id.*, at 777.

The Montana Supreme Court's decision improperly resolves the federal question left open by this Court in *Coutu*. Although this Court declined to rule on the question, the reasoning applied by the Court indicates that a private right of action does not exist under section 1 of the Davis-Bacon Act even if the federal contract contains Davis-Bacon stipulations. The Montana Supreme Court's decision leads to an opposite result. This Court should remedy the inconsistency between its decision in *Coutu* and the Montana Supreme Court's decision by granting this petition for a writ of certiorari.

CONCLUSION

For the reasons stated above, ARC respectfully requests this Court grant this petition for a writ of certiorari.

Respectfully submitted,

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IN THE SUPREME COURT OF THE
STATE OF MONTANA

2002 MT 266

BILL FAVEL, JOHN PITZER,
JOE LaMERE, TOBY LaMERE
and ALVIN BELGARDE,

Plaintiffs/Appellants,

v.

AMERICAN RENOVATION
AND CONSTRUCTION CO.,
a California corporation;
JOHN DOES I and II,

Defendants/Respondents.

STATE OF MONTANA

(Filed Nov. 26, 2002)

APPEAL FROM: District Court of the Eighth Judicial
District,
In and for the County of Cascade,
The Honorable Julie Macek,
Judge presiding.

COUNSEL OF RECORD:

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Crowley, Haughey, Hanson, Toole &
Dietrich, Bozeman, Montana

Heard: March 12, 2002
Submitted: March 19, 2002
Decided: November 26, 2002

Filed:

/s/ Ed Smith
Clerk

Justice Patricia O. Cotter delivered the Opinion of the Court.

¶ 1 This case was brought by a group of construction workers (Workers) who performed labor under a federal contract (Contract) between the American Renovation and Construction Company (ARC) and the United States Air Force (USAF or Air Force) to construct military housing at Malmstrom Air Force Base (Malmstrom AFB) in Great Falls, Cascade County, Montana. The Workers sued for breach of contract, alleging that they were not paid prevailing wages under the federal Davis-Bacon Act as required by the Contract. The Eighth Judicial District Court of Cascade County dismissed the suit on June 12, 2001, ruling that the Davis-Bacon Act did not provide the Workers with a private right of action; therefore, it lacked jurisdiction to hear the Workers' claims. We reverse.

ISSUES

¶ 2 A restatement of the issue presented by the parties is whether the Montana District Court has subject matter jurisdiction to hear and determine Workers' common law claims for breach of a Contract under which they were

guaranteed wages based upon wage standards established by the federal Davis-Bacon Act.

FACTUAL BACKGROUND

¶ 3 In March 1998, the USAF and ARC entered into a Contract under which ARC would construct military housing at Malmstrom Air Force Base in Great Falls, Cascade County, Montana. While the Contract was not provided for this Court's review, it is undisputed that the Contract required ARC to pay its laborers federal Davis-Bacon Act wages (hereinafter wages). Subsequently, ARC entered into subcontracts with Baer Construction and Four Winds Construction. Under ARC's Contract with the Air Force, ARC was required to include in any subcontracts the provision that all subcontractors working on the project would pay their laborers in accordance with the Davis-Bacon Act. The contracts between ARC and its subcontractors were not provided for our review, but it is undisputed that these contracts included the required Davis-Bacon wage provision.

¶ 4 Workers are former employees of Baer Construction (Baer) and/or Four Winds Construction (Four Winds) [1] who worked on the Malmstrom AFB project as iron workers, carpenters, cement masons and other "skilled trades." Workers claim they were improperly paid unskilled laborer wages. Additionally, Workers maintain that when they complained to Baer that they were not being paid in

[1] Baer and Four Winds are referenced in the caption of this case as John Does I and II because Workers claim that these companies are not legal entities authorized to do business in Montana.

accordance with the contract between Baer and ARC, Baer fired them. They then began working for Four Winds and claim that Four Winds likewise failed to pay them the skilled wages required under Four Winds' contract with ARC. (We note, however, that no precise allegations were made against Four Winds nor were any administrative decisions made pertaining to Four Winds.) In November 1998, the Workers complained to ARC that ARC's subcontractors were not paying them in accordance with the wage provisions of their contracts with ARC. Prior to this November meeting between Workers and ARC, and subsequent to it, ARC consistently represented to the USAF that it and its subcontractors were paying all laborers appropriate Davis-Bacon wages.

¶ 5 Workers complained to the USAF Contracting Officer (Contracting Officer) who agreed that the Workers should have been paid "skilled laborer" wages. The Contracting Officer notified ARC that it was ARC's responsibility to insure that subcontractors' employees were accurately paid in accordance with the contractually-prescribed Davis-Bacon job classifications and wage rates. There is no evidence in the record that the Contracting Officer notified the DOL of the complaint or consulted with the DOL regarding Workers' claims. ARC forwarded a copy of the Contracting Officer's letter to Baer and instructed Baer to resolve the matter as directed by the USAF. Baer refused to do so despite multiple requests by ARC. Subsequently, ARC withheld funds that it would have paid to Baer and dispersed these funds to the underpaid Workers. The total amount paid by ARC, however, was significantly less than the amounts the USAF and the Workers claimed were owed. The above facts provide a short factual summary

but additional facts will be discussed as necessary in our analysis.

PROCEDURAL HISTORY

¶ 6 Workers filed a law suit in June 1999, in the United States District Court, Great Falls Division, against ARC, ARC's surety, St. Paul Fire and Marine Insurance Company, and ARC's subcontractors. Workers sought damages directly from ARC and its subcontractors under the Davis-Bacon Act and from ARC's surety under the Miller Act. The federal district court judge characterized Workers' claim as a claim for back wages under the Davis-Bacon Act. The court concluded that 40 U.S.C. § 276a of the Davis-Bacon Act did not give Workers a private right of action but that 40 U.S.C. § 276a-2(b) did, vis-a-vis a Miller Act claim. The federal court, therefore, stayed the Miller Act proceeding, holding that a yet-to-be-obtained DOL wage determination was a condition precedent to such a proceeding. Workers, having presented extensive USAF documentation of underpayment to the federal court to no avail, then dismissed their federal action without prejudice and sought relief in state court. The Workers thereafter pursued their state remedies and did not reinstitute their federal proceeding before the statute of limitations expired. [2]

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[2] Voluntary dismissal of a federal action without prejudice does not toll the statute of limitations. *Brown v. Hartshorne Public School Dist. No. 1* (10th Cir. 1991), 926 F.2d 959 ("It is hornbook law that, as a general rule, a voluntary dismissal without prejudice leaves the parties as though the action had never been brought." (citation omitted)).

¶ 7 Workers sued ARC and its subcontractors in the District Court of the Eighth Judicial District, Cascade County. They sought recovery on various common law grounds including, but not limited to, breach of contract, negligence, and wrongful discharge. ARC moved to dismiss the complaint on the grounds that it failed to state a claim for which relief may be granted. The state court dismissed the complaint without prejudice for lack of subject matter jurisdiction holding that the Davis-Bacon Act did not grant Workers a private right of action. The state court agreed with the federal court that Workers had failed to exhaust their administrative remedies. Workers filed a timely appeal.

STANDARD OF REVIEW

¶ 8 The State District Court dismissed this case for lack of subject matter jurisdiction. "Motions to dismiss should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Winslow v. Montana Rail Link, Inc.*, 2000 MT 292, ¶ 13, 302 Mont. 289, ¶ 13, 16 P.3d 992, ¶ 13 (citing *Hilands Golf Club v. Ashmore* (1996), 277 Mont. 324, 328, 922 P.2d 469, 471-72). "In considering such motions, the complaint is construed in the light most favorable to the plaintiff and all allegations of fact contained therein are taken as true. The District Court's determination that it did not have jurisdiction over this case is a conclusion of law." *Winslow,* ¶ 13 (citing *Pike v. Burlington N.R.R. Co.* (1995), 273 Mont. 390, 392-93, 903 P.2d 1352, 1353). "We review a district court's conclusions of law to determine whether the court's interpretation of the law is correct." *Winslow,* ¶ 13 (citing *Hilands Golf Club,* 277 Mont. at 328, 922 P.2d at 472).

DISCUSSION

¶ 9 The primary question before this Court is whether the Montana District Court has subject matter jurisdiction to hear and determine Workers' common law claims for breach of a contract under which they were guaranteed wages based upon wage standards established by the federal Davis-Bacon Act.

¶ 10 ARC argues that because all of Workers' claims are based on failure to pay wages established by the Davis-Bacon Act, Workers are limited to Davis-Bacon-prescribed remedies. It maintains that the state district court correctly held that it did not have jurisdiction over Workers' claims because there is no "private right of action" under the Davis-Bacon Act. In other words, Workers may not sue a contractor or subcontractor in state or federal court, under the Davis-Bacon Act, for a violation of the Davis-Bacon Act. Rather, ARC maintained and the state court agreed, Workers must first obtain a DOL determination that a violation occurred, that Workers are owed money, and how much money each individual Worker is due. Upon an administrative determination that Workers had been underpaid, Workers would be paid from any funds that had been withheld in accordance with the regulations. If such withheld funds were insufficient to pay the full amount due, Workers could then sue ARC's surety under the Miller Act[3].

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[3] The Miller Act requires that before a contractor may be awarded a federal construction contract, the contractor must post a payment bond for the protection of persons providing labor and material to the construction project. 40 U.S.C. § 270a(a)(2).

¶ 11 Workers, on the other hand, claim that this is not a "private right of action" case but rather a "preemption" case. Workers seek to enforce a labor contract that incorporated the Davis-Bacon Act and included wages established under the Act. Therefore, they are seeking a state common law remedy for breach of contract. Thus, the question is not whether they have the right to bring a private action under the Davis-Bacon Act, but rather, is whether the Davis-Bacon Act expressly or impliedly preempts alternative or supplemental state remedies.

¶ 12 Additionally, Workers argue that, in this case, an administrative remedy is non-existent, or, at best, inadequate. Workers claim that numerous relevant administrative decisions were made in their favor and that ARC and Baer accepted these decisions without challenge or a request for DOL review. Therefore, Workers argue, ARC and Baer are estopped from now claiming that additional unexhausted administrative remedies exist. The District Court did not address these issues.

The Davis-Bacon Act

¶ 13 The Davis-Bacon Act, 40 U.S.C. § 276(a), *et seq.*, was passed in 1931 during the Depression to protect workers on federal construction projects. Under the Act, the Secretary of Labor sets minimum wages for various job classifications that reflect "prevailing wages" in the area of the project. The Act mandates that no contractor may pay less than these prevailing wages to their employees working on any construction project over $2,000 to which the United States is a party. This prevents companies from competing for federal contracts using bids based on importing laborers from distant areas who would work for lower wages

than local laborers. *See* 40 U.S.C. § 276a(a). *See also, Vulcan Arbor Hill Corp. v. Reich* (D.C. Cir. 1996), 81 F.3d 1110, 1111 (citation omitted). Numerous courts have held that the Act was designed specifically to protect the interests of laborers. *See, U.S. v. Binghamton Construction Co.* (1954), 347 U.S. 171, 177 and 178, 74 S.Ct. 438, 441 and 442, 98 L.Ed. 594, 599 and 600; *Thompkins v. Fuller* (1983), 205 Mont. 168, 667 P.2d 944; *Building and Const. Trades Dept., AFL-CIO v. Reich* (D.C. Cir. 1994), 40 F.3d 1275.

¶ 14 After the Davis-Bacon Act was passed into law, the Department of Labor promulgated detailed regulations for its implementation. 29 C.F.R. §§ 5, 6, and 7. In addition to the regulations defining how the Secretary of Labor will establish prevailing wage rates, the regulations also dictate specific contract provisions that must be included in federal construction contracts, provide debarment procedures for contractors who violate the Davis-Bacon Act, and identify those entities who may initiate a proceeding in the event of a wage dispute. 29 C.F.R. §§ 5.5, 5.12 and 5.11 respectively.

¶ 15 The state court held that Workers cannot sue ARC and Baer in state court but rather they must avail themselves of the administrative remedies set out in the DOL's regulations. The court stated that Workers must obtain a DOL determination that wages are due, then seek recovery under the Miller Act. Workers claim they have utilized the administrative procedure extensively, without remedy. The facts set forth below support the Workers' claim.

¶ 16 Baer and ARC entered into their contract in March 1998. At some time between March 1998 and November

1998, Workers complained to Baer that they were performing skilled labor, as defined by the DOL job classifications applicable to the construction project, but were being paid unskilled laborer wages. Baer fired them. In November 1998, Workers met with representatives of ARC, the Montana Labor Management Alliance (MLMA) and Baer. They complained that Baer was breaching its contract with ARC by not paying contractually-agreed upon wages to its skilled laborers and that Baer had fired them for complaining about it. The MLMA representative suggested that ARC submit a request to DOL for "new" job classification and wages rates for jobs performed by the Workers. He said he would inform the meeting attendees of the DOL's determination and they could accept it or appeal it at that time. ARC submitted the classification/wage request to DOL in December 1998. No USAF or DOL response to this request was provided to this Court.

¶ 17 By early April 1999, the USAF Contracting Officer had received notice of the complaints. She responded by sending a letter dated April 9, 1999, to ARC in which she notified ARC that, as general contractor, it was ARC's responsibility to insure that its subcontractors complied with the Davis-Bacon Act. She noted that ARC was responsible for reviewing the payrolls for discrepancies and having those discrepancies corrected prior to submitting them to the USAF. The Contracting Officer noted that, "[a]ccording to the Department of Labor," the work being performed by the complaining Baer laborers fell within specific job classifications with prescribed wages. She determined that Workers and other laborers had been underpaid by Baer. She included in her letter to ARC a list of Baer employees, which included Workers, who had been underpaid. She classified them within the correct DOL job

classification and calculated the amount of unpaid wages each of these employees was owed by Baer.

¶ 18 Also on April 9, 1999, ARC sent a letter to Baer informing Baer that it had received a determination from the MLMA that Baer had underpaid the complaining laborers. ARC notified Baer that failure to pay wages in accordance with the Davis-Bacon Act was a direct breach of their contract. It instructed Baer to fully compensate the underpaid employees in accordance with the MLMA's directive.

¶ 19 In May and June 1999, ARC submitted several other requests for "new" job classifications to the DOL. On the DOL request form, ARC recommended hourly wage rates for these "new" job classifications. The Contracting Officer, after conferring with DOL, notified ARC that each of its requests was denied because job classifications for the job descriptions included in the requests were not "new" but already existed and were part of the project Contract. The "new" job classifications ARC sought were for work performed by the Workers, as well as other laborers. The hourly wage rate recommended by ARC in its requests was lower than the hourly wage rates assigned under the Davis-Bacon Act to the existing job classifications. ARC did not challenge or seek further DOL review of the USAF and DOL's denial of its job classification and wage rate requests.

¶ 20 Immediately thereafter, on July 9, 1999, ARC sent a letter to Baer attaching the Contracting Officer's April 9, 1999 letter and instructing Baer to pay the listed employees in accordance with the USAF letter. Baer refused to do so. Also in July 1999, ARC notified the Contracting Officer that it was processing "an equitable amount" to be paid to

the "parties concerned" and that a settlement was being negotiated. Subsequently, ARC withheld some funds due to Baer and paid these funds to Workers. These funds, however, were insufficient to pay Workers the amount of money owed to them according to the Contracting Officer. No settlement was ever reached.

DOL Regulations

¶ 21 The DOL regulations implementing the Davis-Bacon Act contain specific provisions and grant broad authority to federal contracting officers. The regulations dictate precise language that must be included in each federal construction project contract. 29 C.F.R. § 5.5. Section 5.5(a)(1)(ii)(A) authorizes the contracting officer for the federal agency to approve or disapprove any new job classifications, wage rates and fringe benefits applicable to the project. If the contractor or the laborers to be employed in the classification disagree with the contracting officer's determination, the contracting officer is required to notify the DOL and seek a DOL determination. 29 C.F.R. § 5.5(a)(1)(ii)(C). In the case at bar, the Contracting Officer conferred with the DOL before making the final decision to deny the requests. ARC did not challenge or seek further review of the Contracting Officer's and DOL's denial. We conclude that these decisions became final agency determinations.

¶ 22 The regulations also address enforcement of the Davis-Bacon Act. The regulations impose upon the federal contracting agency the responsibility to ensure that the contract provisions in 29 C.F.R. § 5.5 are included in each appropriate contract. In other words, the contracting

officer has the authority to determine when the Davis-Bacon Act applies to a federal project. 29 C.F.R. § 5.6(a)(1).

¶ 23 The regulations require that the federal contracting agency, in this case the USAF, "shall cause such investigations to be made as may be necessary to assure compliance with the labor standards clauses required by § 5.5. . . . Complaints of alleged violations shall be given priority." Additionally, contracting officers are instructed that "particular care shall be taken to determine the correctness of classifications." 29 C.F.R. § 5.6(a)(3). This plain language indicates that when the federal contracting agency is aware of allegations of Davis-Bacon wage violations, the contracting agency undertakes an administrative investigation to determine if violations have occurred and, if so, what monies are owed to which persons. The DOL provides to contracting agencies investigatory material to utilize during these authorized contractor examinations, including material with which to compute back wages and liquidated damages based upon their investigations. 29 C.F.R. § 5.6(a)(4). While the regulatory language appears to contemplate, if not impose, a mandatory duty of investigation, the record in this case does not reveal to what extent a USAF investigation occurred. Nonetheless, the Contracting Officer reached the decision that the Act had been violated and determined what monies were owed to which persons. Under the plain language of the regulations, she had the authority to make this determination. Again, ARC and Baer did not challenge her authorization or determination of violation.

¶ 24 Moreover, while the regulations provide that the USAF "shall" withhold sufficient funds to pay the laborers in accordance with the contract, should the contractor fail to do so or fail to submit payroll records (29 C.F.R.

§§ 5.5(a)(2), 5.5(a)(3)(iii) and 5.9), the statute makes such withholding on the part of the federal contracting agency discretionary. 40 U.S.C. § 276a(a). Whether discretionary or mandatory, the USAF Contracting Officer had the unilateral authority to make such a decision, but there is no evidence that such funds were withheld in this case. When the Air Force notified ARC that ARC was responsible for paying the Workers if Baer failed to do so, there is no mention in the letter that the USAF Contracting Officer was withholding or would withhold payments to ARC with which to pay Workers if ARC did not. ARC accepted the USAF's determination of its responsibility and did not seek a DOL review or investigation.

¶ 25 Furthermore, the regulations authorize the federal contracting agency to terminate the contract in the event the contractor or subcontractor breach the contract by failing to comply with any of its terms. 29 C.F.R. § 5.9. *See also,* 29 C.F.R. § 5.5(a)(7). Typically, once matters have reached this point, the contracting officer withholds accrued funds due to the contractor and administratively diverts those funds to the underpaid laborers. However, and despite the USAF Contracting Officer's determination that the subcontractor breached the contract, the USAF did not fire ARC. Rather, it issued a determination of violation, defined the remedy and instructed its implementation. Had the USAF withheld funds with which to pay Workers, upon its recognition that ARC failed to pay them the amount owed based on the USAF's determination, it would have been obligated to then take the actions necessary to provide payment to the Workers. The USAF, which supported the Workers' claims from the onset, did not indicate the availability of such funds. This supports

Workers' speculation that no funds were withheld by the USAF with which to pay Workers.

¶ 26 In addition, 29 C.F.R. § 5.11 sets forth the procedure for resolving disputes of fact or law concerning payment of prevailing wage rates. Significantly, these dispute procedures may be initiated by the DOL Administrator, the federal contracting agency, or upon request by the contractor or subcontractor. Unlike § 5.5(a)(1)(ii)(C) (which gives laborers dispute rights over job classifications in the contract), § 5.11 does not list aggrieved laborers among those who may initiate wage dispute proceedings.

¶ 27 This omission led the Second Circuit Court of Appeals in *Chan v. City of New York* (1993), 1 F.3d 96, 106, to determine that laborers who were to be paid Davis-Bacon wages under § 5310 of the Housing and Community Development Act of 1974, 42 U.S.C. § 5310 (HCDA), could invoke a remedy under 42 U.S.C. § 1983 because "[t]he laborers who are beneficiaries of § 5310 were not and are not allowed to initiate administrative dispute-resolution proceedings [under 29 C.F.R. § 5.11]. Nor is there any provision for a laborer to obtain judicial review of any administrative decision." The Second Circuit, therefore, concluded that the regulatory scheme under the HCDA and the Davis-Bacon Act was not so comprehensive as to preclude other remedies.

¶ 28 By contrast, in *Reidell v. U.S.* (1999), 43 Fed. Cl. 770, plaintiff Reidell, a laborer for a subcontractor, contacted the DOL directly and requested the agency to determine whether the federal contract under which he was working was subject to the Davis-Bacon Act. The contracting officer for the project had concluded that the Davis-Bacon Act did not apply. The DOL reviewed the

project and determined that the Act did apply and that laborers on the project should be paid Davis-Bacon wages retroactive to the commencement of the project. An important distinction between *Reidell* and the case at bar is that Reidell was seeking a ruling as to whether the Davis-Bacon Act applied to a specific contract. The applicability of the Davis-Bacon Act is clearly a decision within the DOL's expertise and purview. The *Reidell* court did not cite the regulatory provisions relied upon by Reidell to initiate the DOL's review. However, under 29 C.F.R. § 5.5(a)(1)(ii)(C), laborers have the express right to challenge a contracting officer's pre-contract decisions regarding job classifications and wages rates, and 29 C.F.R. § 1.6(f) gives the DOL the express authority to amend an existing contract to provide for erroneously-excluded Davis-Bacon wages and make those wages retroactive. *Reidell,* therefore, is inapposite to the case at bar because there is no question that the Davis-Bacon Act applied to this Contract nor were there any other pre-contract issues to be resolved. Workers are seeking to be paid wages that all parties agreed to pay in the Contract and that the federal contracting agency has determined are due.

¶ 29 Under the plain language of the regulations, laborers may dispute pre-contract issues but do not have the express right to initiate proceedings concerning factual or legal disputes over the payment of prevailing wages. The USAF, ARC and Baer all had the express right to initiate the formal DOL dispute resolution process. However, none of them did.

¶ 30 Lastly, 29 C.F.R. § 5.13 requires that "[a]ll questions relating to the application and interpretation of wage determinations . . . shall be referred to the Administrator for appropriate ruling or interpretation." This provision is

inapplicable to Workers because they had no questions relating to the application or interpretation of wage determinations. If ARC or Baer had such questions, they should have sought a ruling or interpretation from the Administrator.

¶ 31 The Workers took all the proper steps in their attempt to resolve this matter. The first step, complaining to Baer, got them fired. The second step, complaining to ARC, appeared to fall on deaf ears for several months. Finally, the third step, USAF involvement, resulted in a determination by the Contracting Officer authorized to make such a determination, that Baer and ARC were in violation of the Davis-Bacon provisions of their contracts and were both equally responsible for paying the Workers the amounts determined by the Contracting Officer. Neither company, though both were adversely affected by the USAF's decision, challenged it.

¶ 32 Every decision made by the USAF supported the Workers' claims. From the Workers' perspective, there was no dispute of fact or law as to the proper classification and wage rate due the Workers. The Air Force calculated that and set it forth in a letter for ARC. Under these circumstances, there was no reason for the Workers to initiate a DOL investigation, nor under the plain language of 29 C.F.R. § 5.11 were they expressly authorized to do so. On the other hand, each USAF/DOL ruling was adverse to ARC and Baer but neither ARC nor Baer challenged any of the adverse decisions. Rather, ARC accepted them and demanded that Baer honor the USAF rulings. Baer refused but did not initiate a DOL determination as it was authorized to do under 29 C.F.R. § 5.11. Had ARC or Baer held information that rebutted the USAF's decision in the

matter, presumably they would have submitted it to the Contracting Officer.

¶ 33 In sum, neither ARC nor Baer have demonstrated that any further administrative review was either necessary or available to the complaining Workers under the clear-language of 29 C.F.R. § 5.11. Moreover, they have failed to even argue that such further administrative review would or should have resulted in a different conclusion than that drawn by the USAF Contracting Officer. On these facts, we therefore conclude that ARC and Baer are estopped from arguing that Workers failed to seek administrative review of the dispute.

¶ 34 It is axiomatic that it is the contracting parties who are adversely affected by a federal contracting officer's or DOL's ruling who appeal the adverse ruling. The party benefitted by the ruling has no reason to do so. Surely, neither law nor reason requires the "winning party" to initiate an appeal in order to recover the proceeds of the victory. More to the point, when the adversely affected parties fail to exercise their statutory right of review, they will not be heard to blame the Workers for failing to appeal from a favorable ruling on their claim.

¶ 35 While 29 C.F.R. § 5.11 does not give laborers the express right to initiate DOL dispute resolution proceedings, this does not mean that the laborers have no obligation to pursue the remedies that are available to them. Because § 5.11 expressly authorizes the federal contracting officer, contractors and subcontractors to initiate dispute resolutions, it is implicit that, if laborers have a "dispute" about wages or job classifications, they must bring their complaints to the attention of these entities so that resolution of the dispute may either be accomplished

informally or through the formal DOL dispute resolution process. It is only when this process fails to result in full payment to the affected workers, as it did in this case, that our holding here will provide such workers relief.

¶ 36 Under the circumstances presented here, we hold that the Workers exhausted the processes available to them. They traveled the "administrative path" only to be thwarted and frustrated for over two years. Unfortunately this "administrative path" did not result in a formal DOL determination, without which the state district court concluded Workers were precluded from seeking recovery under the Miller Act. While we disagree with the District Court's conclusion, based upon our determination here that the authorized federal contracting party's administrative decision became final when the parties adversely affected by it failed to pursue review of it, the question remains whether Workers have an alternate remedy or whether they must bear the loss for the other parties' breaches of contract and violations of the law. We therefore must determine whether Workers' claim for relief in the State District Court, once they have demonstrated exhaustion of the Davis-Bacon regulatory requirements, is preempted by the Davis-Bacon Act.

Preemption

¶ 37 ARC maintains that Workers may not seek relief in state court but, upon exhaustion of their administrative remedies, are limited to bringing a Miller Act claim in federal court. Workers assert that unless the Davis-Bacon Act preempts a state action, they are not so limited and may seek contract enforcement before the state court.

¶ 38 Workers claim they are not seeking to enforce the Davis-Bacon Act labor standards but are seeking to enforce a contract that includes specific Davis-Bacon wage provisions. This distinction is subtle but important. Workers are not challenging the job classifications established by the DOL for the construction project, nor are they challenging the wages or benefits assigned by the DOL to these job classifications. Workers are seeking to enforce a contract requiring that they be paid predetermined wages for well-defined job duties. The USAF Contracting Officer determined, based upon their job descriptions, to which classification they belonged and the proper wage rate for that classification. She determined the number of hours the Workers performed the tasks for each job classification and the total wages each Worker was underpaid. Neither ARC nor Baer, both of whom were authorized to dispute the USAF's findings in this regard, disputed or challenged these findings with DOL. Therefore, there are no disputed facts that require the specialized expertise of DOL. This is a simple breach of contract action. We must now decide, however, whether the Davis-Bacon Act preempts state law and forecloses the opportunity to use state remedies as an alternative or supplement to federal or administrative remedies.

¶ 39 Both the United States Supreme Court and this Court have plainly held that preemption is not easily favored. "Because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action. In all pre-emption cases, . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Sleath v.*

West Mont Home Health Services, 2000 MT 381, ¶ 23, 304 Mont. 1, ¶ 23, 16 P.3d 1042, ¶ 23 (citing *Medtronic, Inc. v. Lohr* (1996), 518 U.S. 470, 485, 116 S.Ct. 2240, 2250, 135 L.Ed.2d 700, 715 and *Cipollone v. Liggett Group, Inc.* (1992), 505 U.S. 504, 516, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407, 422). This presumption against preemption "can only be overcome by evidence of a 'clear and manifest' intent of Congress to preempt state law." *Sleath,* ¶ 61 (citing *Wisconsin Public Intervenor v. Mortier* (1991), 501 U.S. 597, 610, 111 S.Ct. 2476, 2484, 115 L.Ed.2d 532, 546).

¶ 40 In determining whether a federal law preempts a state law, including a common law cause of action, we must determine whether Congress intended the federal law to preempt state law. There are three ways in which state law may be superseded by federal law. First, the legislature may expressly include in the federal statute a preemption clause, making it clear that state law will not apply in the area governed by the federal statute. Second, congressional intent to preempt state law in a particular area may be implied where the regulation of the area is so comprehensive that it is reasonable to conclude that Congress intended to "occupy the field" and to leave no room for supplementary state regulation. Lastly, federal law may supersede state law when the state law actually conflicts with the federal law. This type of conflict manifests itself as an inability to comply with both the federal and state law, or because "the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillsborough County v. Automated Medical Labs.* (1985), 471 U.S. 707, 713, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714, 721; *see also, Siuslaw Concrete Const. v. Wash., Dept. Of Transp.* (9th Cir. 1986), 784 F.2d 952, 955.

¶ 41 We first consider express preemption. The Davis-Bacon Act itself does *not* contain an express state law preemption clause; therefore, we will not presume that Congress intends the Davis-Bacon statute to preempt state law. When Congress intends a statute to supersede state laws, it knows how to say so and does so expressly. *See, e.g.,* Employee Retirement Income Security Program, 29 U.S.C. § 1144(a) (2001) ("Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title."). *See also,* Federal Election Campaign Act, 2 U.S.C. § 453 (2001); Uniform Time Act of 1966, 15 U.S.C. § 260(b) (2001); Armored Car Industry Reciprocity Act, 15 U.S.C. § 5903 (2001).

¶ 42 We next consider whether the DOL regulations purport to preempt state law. While the U.S. Supreme Court has stated on several occasions that an agency's preemption regulations have no less preemptive effect than statutes, *Fidelity Federal Sav. Loan Assn. v. de la Cuesta* (1982), 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664, 675, the fact is there is no express preemption provision in the Davis-Bacon DOL regulations. Therefore, we continue our analysis to determine if the regulations imply preemption or if conflict preemption exists.

¶ 43 ARC argues that the DOL's regulations "imply" that Congress intended to occupy the entire field relating to Davis-Bacon wages and left no room for state enforcement of any dispute relating to the Davis-Bacon Act. While it is well established that federal regulations may preempt

other laws or remedies, the U.S. Supreme Court has issued this caution:

> We are even more reluctant to infer pre-emption from the comprehensiveness of regulations than from the comprehensiveness of statutes. As a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress. To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence (citation omitted).
>
> Moreover, because agencies normally address problems in a detailed manner and can speak through a variety of means, including regulations, preambles, interpretive statements, and responses to comments, we can expect that they will make their intentions clear if they intend for their regulations to be exclusive. Thus, if an agency does not speak to the question of pre-emption, we will pause before saying that the mere volume and complexity of its regulations indicate that the agency did in fact intend to pre-empt.

Hillsborough, 471 U.S. at 717-18, 105 S.Ct. at 2377, 85 L.Ed.2d at 724; *Siuslaw,* 784 F.2d at 957.

¶ 44 The Court reiterated these concerns in *Geier v. American Honda Motor Co.* (2000) 529 U.S. 861, 908-09, 120 S.Ct. 1913, 1940, 146 L.Ed.2d 914, 949, when it stated:

> While the presumption [against preemption] is important in assessing the pre-emptive reach of federal statutes, it becomes crucial when the pre-emptive effect of an administrative regulation is at issue. Unlike Congress, administrative agencies are clearly not designed to represent the interests of States, yet with relative ease they can promulgate comprehensive and detailed regulations that have broad pre-emption ramifications for state law. We have addressed the heightened federalism and nondelegation concerns that agency pre-emption raises by using the presumption to build a procedural bridge across the political accountability gap between States and administrative agencies. Thus, even in cases where implied regulatory pre-emption is at issue, we generally "expect an administrative regulation to declare any intention to pre-empt state law with some specificity" (citation omitted).

See also, Fidelity Fed. Sav. & Loan Assn., 458 U.S. at 154; 102 S.Ct. 3014; *R.J. Reynolds Tobacco Co. v. Durham County* (1986), 479 U.S. 130, 149, 107 S.Ct. 499, 511, 93 L.Ed.2d 449, 467.

¶ 45 The DOL regulations are detailed and complex – they define relevant terms, they address contract provisions, they instruct contractors on payroll reporting and permitted apprentice and trainee programs, they dictate overtime requirements, they set forth debarment proceedings, and they describe how to initiate a dispute concerning payment of wages. They do *not* speak to the question of preemption, however. It is reasonable to presume, therefore, with all the other detailed mandates of the regulations, that had DOL intended the regulations to preempt

other laws and remedies, such an express provision would have been inserted.

¶ 46 Moreover, the regulatory section regarding disputes over the payment of wages does not even give an aggrieved laborer the express right to initiate a proceeding. Presumably, if 29 C.F.R. § 5.11 had meant for an "employee" or "laborer" to have such a right, the regulation would have expressly provided so. Instead, the regulations expressly authorize the laborer only to complain to the contracting officer if the laborer disagrees with the establishment of job classifications and wage rates to which he or she would be affected. 29 C.F.R. § 5.5(a)(1)(ii)(C). Absent the availability of an express regulatory remedy for laborers seeking payment of established wages, we are loathe to imply preemption of other remedies.

¶ 47 We conclude, as did the U.S. Supreme Court in *Geier,* 529 U.S. 861 at 908-09, that regulatory preemption will not be implied absent some declaration of an intent to preempt. Such a declaration being absent here, we find no implied preemption in the Davis-Bacon regulations.

¶ 48 Finally, we analyze whether state law remedies would actually conflict with the Federal Act. There are two types of conflict preemption: (1) "where it is impossible to comply with both state and federal requirements"; and (2) "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Williamson v. General Dynamics Corp.* (9th Cir. 2000), 208 F.3d 1144, 1152 (citing *Industrial Truck Ass'n, Inc. v. Henry* (9th Cir. 1997), 125 F.3d 1305, 1309). "In determining whether a state law conflicts with federal statutes or regulations, the federal-state conflict must be actual and unavoidable, not merely possible." *Siegel v.*

American Sav. & Loan Assn. (1989), 210 Cal.App.3d 953, 965, 258 Cal.Rptr. 746, 752 (citation omitted). Additionally, courts must "determine whether, under the circumstances of [a] particular case, [that State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Jones v. Rath Packing Co.* (1977), 430 U.S. 519, 526, 97 S.Ct. 1305, 1310, 51 L.Ed.2d 604, 614 (citations omitted). ARC argues that allowing a state cause of action to enforce wage provisions in an employment contract based upon the Davis-Bacon Act results in an irreconcilable conflict between the federal law and the state action. In this case, we disagree for three reasons.

¶ 49 First, DOL's dispute regulations prescribe how factual and legal disputes concerning payment of wages are to be resolved through administrative proceedings. 29 C.F.R. § 5.11. Here, the amount of wages and the job classifications have already been established and agreed upon by the contractors and subcontractors. However, even if ARC's and Baer's failure to pay contractually-agreed upon wages qualifies as a dispute described by § 5.11, the fact remains that the regulation does not give the Workers the express right to initiate the administrative proceedings. Therefore, granting a remedy to an aggrieved laborer who has no express administrative remedy does not frustrate the regulations.

¶ 50 Second, the purpose of the Act is to guarantee that workers on federal construction projects are paid a specified minimum wage. Allowing the Workers here the right to enforce the wage provisions in the Contract in state court will not impose a hardship on the contractors. Because contract enforcement occurs long after contract bidding and acceptance, the contractors are still able to

submit bids which include "known" labor costs in accordance with the Davis-Bacon Act. Additionally, in a state contract enforcement action, laborers are simply seeking to recover the amount of wages contemplated in the contract. Therefore, granting laborers an alternative remedy in certain limited circumstances does not frustrate or undermine the purpose of the Davis-Bacon Act, nor does it impose greater or unexpected labor costs on the contractors.

¶ 51 Lastly, the contractor discipline provisions in the regulations are not frustrated by our conclusion. There are three primary means of disciplining violating contractors: contract termination, 29 C.F.R. § 5.5(a)(7); withholding or suspension of funds, 29 C.F.R. § 5.9; and debarment, 29 C.F.R. § 5.12. The USAF Contracting Officer unilaterally had the authority to terminate the Contract with ARC upon her determination that ARC had breached its Contract with the Air Force. She also had the unilateral authority to withhold funds from ARC or suspend payments to ARC upon a finding of breach. While she did not have the authority to pursue debarment of ARC and Baer, there was nothing to preclude her from notifying the DOL that the USAF had rendered a determination of violation and a calculation of wages due that has not been appealed by the adversely affected parties. Such notice to DOL by the federal contracting agency would allow the DOL to take any of the regulatorily-authorized steps it considered appropriate toward the violating contractor. Quite simply, contractors who violate the law remain subject to regulatory discipline, whether or not the instant action goes forward in state court.

¶ 52 Under the circumstances presented here, we hold that a state remedy does not stand as an obstacle to the

accomplishment and execution of the Davis-Bacon Act. The Workers have complied with the federal requirements to the extent they were allowed and this additional remedy, in no way, will render it impossible for the other contracting parties to comply with federal requirements. We therefore conclude that the Davis-Bacon Act does not preempt Workers' right to a state enforcement action under these facts.

Private Right of Action

¶ 53 ARC urges us to resolve this case under a "private right of action" analysis. There are cases in several jurisdictions holding that laborers do not have the right to bring a private action against a contractor under the Davis-Bacon Act, but may only bring a Davis-Bacon wage action vis-a-vis a Miller Act claim. *See, United States, etc. v. Capeletti Bros., Inc.* (5th Cir. 1980), 621 F.2d 1309; *Oper. Eng. Health & Welfare v. JWJ Contracting Co.* (9th Cir. 1998), 135 F.3d 671; *Weber v. Heat Control Co.* (3d Cir. 1984), 728 F.2d 599. However, the Seventh Circuit held that an implied private right of action exists under the Davis-Bacon Act when, as in this case, the express remedies provided by the Act are not available. *McDaniel v. University of Chicago* (7th Cir. 1977), 548 F.2d 689, *cert. denied* (1978), 434 U.S. 1033, 98 S.Ct. 765, 54 L.Ed.2d 780 (*McDaniel II*). The Seventh Circuit's first decision, reached in *McDaniel v. University of Chicago* (1975), 512 F.2d 583, was vacated by the U.S. Supreme Court, and the matter was remanded back to the Seventh Circuit to be reviewed in light of the Supreme Court's decision in *Cort v. Ash* (1975), 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26. *University Of Chicago v. McDaniel* (1975), 423 U.S. 810, 96 S.Ct. 20, 46 L.Ed.2d 30. The Seventh Circuit analyzed the

McDaniel case under the *Cort* test in *McDaniel II* and reached its original decision for a second time. The U.S. Supreme Court subsequently denied cert. *See also, Norling v. Valley Contracting and Pre-Mix* (D.N.D. 1991), 773 F.Supp. 186 and *Stampco Constr. Co., Inc. v. Guffey* (Ind. 1991), 572 N.E.2d 510.

¶ 54 It is significant that the U.S. Supreme Court has considered many Davis-Bacon cases but has specifically declined to resolve the "private right of action" issue. *Universities Research Assn. v. Coutu* (1981), 450 U.S. 754, 769, 101 S.Ct. 1451, 1460, 67 L.Ed.2d 662, 674 ("Similarly, we do not decide whether the Act creates an implied private right of action to enforce a contract that contains specific Davis-Bacon Act stipulations."). We likewise decline to reach this issue. Rather, because we find pre-emption inapplicable here, and, in keeping with Montana's longstanding policy and constitutional guarantee in Article II, Section 16 granting citizens access to our courts when they are aggrieved, we hold that under the specific facts of this case, Workers, as third party beneficiaries to the Contracts between the USAF, ARC and Baer, may bring and pursue a state claim to enforce the terms of the Contract.

¶ 55 This decision is limited to the named Petitioners/Appellants. There is no proof of class certification and we render no ruling as to other potential claimants. Moreover, inasmuch as Workers' claims for either negligence or for penalties under § 39-3-206, MCA, were not decided by the state court nor raised on appeal, we will not consider those claims here.

Summary of Analysis

¶ 56 We agree that the Davis-Bacon Act and the accompanying DOL regulations theoretically provide an administrative remedy under which aggrieved parties to a contract incorporating the Act may seek relief. We further agree that the administrative procedure, when available and not otherwise exhausted, must be routinely pursued to its intended conclusion. However, when an administrative remedy is not available or has been exhausted, and the underlying statute and regulations do not preempt state law, the Montana Constitution gives citizens the right to bring grievances to our courts. The Workers have that right in this case.

¶ 57 We hold that the Workers satisfactorily exhausted their available administrative remedies by obtaining unchallenged, unappealed USAF/DOL rulings, and that the Davis-Bacon Act does not expressly or impliedly preempt this state common law cause of action under these circumstances. We further conclude that the Workers, as third party beneficiaries of the Contract, have the right to sue to enforce that Contract.

¶ 58 Lastly, we do not disagree with the conclusions reached in Justice Rice's Concurrence. However, having concluded that the Workers had a right to seek a contractual remedy in state court and recognizing that the Workers did not reinstitute their federal action before the Miller Act statute of limitations had expired, we saw no reason to address the rights which might otherwise be available under the Miller Act.

CONCLUSION

¶ 59 We hold that the State District Court incorrectly concluded that it lacked subject matter jurisdiction. Therefore, we reverse and remand to allow the Workers to proceed with their breach of contract action against the defendants.

/s/ Patricia Cotter
Justice

We Concur:

/s/ Karla M. Gray
Chief Justice

/s/ James C. Nelson

/s/ W. William Leaphart

/s/ James Regnier
Justices

Justice Jim Rice specially concurring.

¶ 60 I concur with the holding of the Court, but do so under a somewhat different rationale. I agree that the District Court has subject matter jurisdiction to adjudicate Workers' state law claims for breach of contract. However, in reaching that conclusion, I believe it necessary to analyze the Miller Act. The Davis-Bacon Act specifically prescribes an available judicial right of action under the Miller Act for the wages at issue here and, therefore, as a Davis-Bacon prescribed remedy, the Miller Act must be

considered in properly assessing the rights of Workers herein.

¶ 61 In addition to the conclusion reached by the majority, I would also conclude that the Miller Act, allowing Workers to sue the contractor and its surety on the bond, as provided for in 40 U.S.C. § 276a-2(b) of the Davis-Bacon Act, is not an exclusive federal remedy and, as such, does not preempt or exclude Workers' breach of contract action under Montana state law.

¶ 62 Initially, I note that ARC was correct when it argued that Workers cannot sue in state or federal court *under the Davis-Bacon Act* for violations of the Davis-Bacon Act. Neither the statutes nor regulations prescribe any such remedy. The regulations implementing the Davis-Bacon Act require proactive conduct on the part of the Federal agency (USAF) and the Department of Labor to protect laborers and mechanics working under federal contracts with Davis-Bacon clauses. See 29 C.F.R. § 5.6(a)(3) and (b) (requiring the Federal agency and Department of Labor to initiate investigations to assure compliance with Davis-Bacon contract clauses, inspect payroll data, and to determine the correctness of classifications, giving priority to complaints of alleged violations). In the event of failure or refusal to pay, 29 C.F.R. § 5.9 authorizes the Federal agency to cause the suspension and withholding of funds sufficient to compensate employees for the wages to which they are entitled. If insufficient funds are subsequently withheld to compensate employees their unpaid wages, there is no remedy to sue *under the Davis-Bacon Act.*

¶ 63 Rather, 40 U.S.C. § 276a-2(b) of the Davis-Bacon Act provides that "[i]f the accrued payments withheld under

the terms of the contract . . . are insufficient to reimburse all the laborers and mechanics with respect to whom there has been a failure to pay the wages required pursuant to this Act, such laborers and mechanics shall have a right of action and/or of intervention against the contractor and his sureties conferred by law upon persons furnishing labor or materials. . . . " This does not refer to a "private action" under the Davis-Bacon Act, but a right of action by the laborer or mechanic on the contractor's payment bond pursuant to the Miller Act. *See Ybanez v. Anchor Constructors, Inc.* (Tex.Civ.App.1972), 489 S.W.2d 730, 739. *See also Universities Research Ass'n Inc., v. Coutu* (1981), 450 U.S. 754, 776-77 & n.28, 101 S.Ct. 1451, 1465 & n.28, 67 L.Ed.2d 662, 679 & n.28.

¶ 64 Workers were thus correct in arguing that this is not a "private right of action" case, but rather a "preemption" case. As the only "right of action" provided to Workers is a right of action under the Miller Act, the relevant inquiry is whether the federal Miller Act remedy is the exclusive remedy available to Workers when the actions of the Federal agency and Department of Labor under the Davis-Bacon Act fail to provide Workers with sufficient funds to compensate their unpaid wages.

¶ 65 Creating confusion in this scenario is the question surrounding the exhaustion of administrative dispute resolution procedures and exhaustion of administrative remedies under the Davis-Bacon Act. The "administrative remedy" provided for laborers and mechanics under the Davis-Bacon Act is the withholding of sufficient funds by the Federal agency/Contracting Officer to reimburse laborers and mechanics their unpaid wages. The laborers and mechanics can initiate such "withholding action" by

giving notice of any alleged violations via complaints to the Federal agency. 29 C.F.R. § 5.6(a)(3).

¶ 66 Upon a Federal agency finding of an actual violation of the Davis-Bacon clauses by the contractor or subcontractor, the Federal agency has authority to cause the suspension of sufficient funds to compensate the laborers and mechanics their unpaid wages. 29 C.F.R. § 5.9. If the Federal agency fails to withhold sufficient funds, the only remaining remedy under the Davis-Bacon Act is a Miller Act action pursuant to 40 U.S.C. § 276a-2(b).

¶ 67 The administrative procedural prerequisite for an actionable Miller Act claim is that Workers must give notice of the alleged contract clause violations to the Federal agency – the USAF. 29 C.F.R. § 5.6(a)(3). The Davis-Bacon regulations provide no further administrative procedures to be completed on behalf of Workers beyond notification to the Federal agency of the alleged violations.

¶ 68 For an actionable Miller Act claim, the Davis-Bacon regulations also require no further administrative determination beyond the Federal agency's determination that the contractor or subcontractor is in violation of the Davis-Bacon clauses. In fact, regarding any post-contract violations by the contractor or subcontractor, the regulations provide no option for the laborers and mechanics other than to complain of the alleged violations to the Federal agency, as the regulations contain no provision for the laborers and mechanics to appeal to the Department of Labor. Neither do the regulations require the Department of Labor to make a post-contract determination of

prevailing wages and employment classifications subsequent to the Federal agency's proper exercise of post-contract authority in making such determinations.[1]

¶ 69 Following Workers' complaint of the alleged violations, the only subsequent administrative determinations essential to an actionable Miller Act claim are a determination of prevailing wages and a determination of the correct classifications for Workers. *See* 40 U.S.C. §§ 276a through 276a-2(b). These determinations cannot be made judicially, as the judiciary has no authority or jurisdiction to determine the correctness of prevailing wages or the correctness of employee wage classifications under the Davis-Bacon Act. *See United States v. Binghamton Constr. Co.* (1954), 347 U.S. 171, 177, 74 S.Ct. 438, 441, 98 L.Ed. 594, 599 ("[t]he correctness of the [Department of Labor's] determination is not open to attack on judicial review").

¶ 70 Applied to the present situation, the Department of Labor initially exercised its authority, pursuant to 40

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[1] The "contract provisions" in 29 C.F.R. § 5.5, dealing with pre-contract determinations have been interpreted to require further post-contract administrative determinations by the Department of Labor if workers file a complaint alleging underpayment of wages due. *See, e.g., Davis v. Hardaway Contracting Co.* (Ark. 1965), 386 S.W.2d 707. However, such interpretation is incorrect and contrary to a plain reading of the regulations. The contract provisions in 29 C.F.R. § 5.5, requiring classification disputes to be referred to the Department of Labor, refer *only* to disputes regarding predetermination of prevailing wages and classification of workers, occurring prior to letting of the contract. *See Universities Research Ass'n Inc., v. Coutu* (1981), 450 U.S. 754, n.9, 101 S.Ct. 1451, n.9, 67 L.Ed.2d 662, n.9 ("[t]here is currently no administrative procedure [under the Davis-Bacon Act] that expressly provides review of a coverage determination after the contract has been let").

U.S.C. § 276a, and determined the prevailing wages and job classifications prior to execution of the contract. The Department of Labor was thus correct when it denied the request by ARC for "new" job classifications, as the Department of Labor had already exercised its "final" authority by its pre-contract determination of prevailing wages, correct job classifications and correct job descriptions. No party to this action disputes these findings and there were thus no disputes of fact or of law to be resolved by the Department of Labor pursuant to 29 C.F.R. § 5.11.

¶ 71 Secondly, the Federal agency/Contracting Officer, pursuant to 29 C.F.R. § 5.6(a)(3), determined that Workers were correctly classified, and were, therefore, underpaid. As noted, this determination is within the explicit authority of the Federal agency. In other words, although the Department of Labor is ultimately the final authority regarding determinations of prevailing wages and worker classifications, the Davis-Bacon regulations afford the Federal agency authority to determine proper classification of workers *prior* to entering into the contract, *see* 29 C.F.R. § 5.5(a)(1)(ii)(A) and (B), and authority to determine the correctness of worker classifications *subsequent* to contract formation, *see* 29 C.F.R. § 5.6(a)(3).[2] The latter

[2] Some case law from other jurisdictions hold otherwise, that generally all disputes must be resolved by the Department of Labor. Such case law is based upon misapplication of precedent. *See, e.g., United States ex. rel Windsor v. DynCorp, Inc.* (E.D. Va. 1995), 895 F.Supp. 844. Relying on *Coutu* and failing to distinguish between pre- and post-contract determination by the Department of Labor, the *DynCorp* court concluded that classification disputes *must* be referred to the Department of Labor. As noted above in footnote 1, however, the *Coutu* court explicitly distinguished between pre- and post-contract determinations and specifically noted that the regulations contain no

(Continued on following page)

authority can be exercised by the Federal agency upon its own initiative or after complaints of alleged violations filed by laborers and mechanics.

¶ 72 The above two administrative determinations by the Department of Labor and the Federal agency, as correctly noted by the majority, fully exhausted all administrative procedures and the administrative dispute resolution process. The result – that Workers were not fully reimbursed for unpaid wages – was not a failure of the administrative dispute resolution process as the Court here finds. To the contrary, there were no disputes to be administratively resolved and the process worked as intended.[3]

¶ 73 With the successful completion of the administrative process, it having been properly determined that the accrued payments withheld were insufficient to reimburse Workers for unpaid wages according to their correct classifications, Workers were free to exercise the final federal remedy provided by 40 U.S.C. § 276a-2(b) of the Davis-Bacon Act: a judicial right of action by Workers

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administrative procedure that expressly provides review of a coverage determination after the contract has been let.

[3]. Pursuant to 29 C.F.R. § 5.7(a)(2), it is the sole responsibility of the Federal agency to report any violations by the contractor or subcontractor to the Department of Labor. However, a failure of the Federal agency to do so has no repercussions on the rights of the complaining laborers and mechanics to receive unpaid wages or to pursue their right of action under the Miller Act, nor does the failure of the Federal agency to submit its mandatory report, as apparently occurred in the present situation, imply that the laborers or mechanics must somehow supplement such inaction by notifying the Department of Labor of the Federal agency's findings.

against the contractor and its surety on the bond pursuant to the Miller Act.

¶ 74 A necessary question before this Court, therefore, is whether the federal Miller Act remedy is intended to be the exclusive remedy available to Workers or whether Workers may, in the alternative, avail themselves to available Montana state law remedies.

¶ 75 The United States Courts of Appeals for the Second, Fifth, Ninth and Tenth Circuits have considered the issue of whether the federal Miller Act provides an exclusive remedy to laborers and mechanics, and these Courts of Appeals have concluded that it does not. *See United States v. Reid & Gary Strickland Co.* (5th Cir. 1999), 161 F.3d 915, 919; *Wright v. United States Postal Service* (9th Cir. 1994) 29 F.3d 1426, 1431; *K-W Industries v. National Surety Corp.* (9th Cir. 1988), 855 F.2d 640, 643; *Active Fire Sprinkler Corp. v. United States Postal Service* (2nd Cir. 1987), 811 F.2d 747, 754; *United States v. Ins. Co. of North America* (10th Cir. 1982), 695 F.2d 455, 458.

¶ 76 The Supreme Courts of Nevada and Wisconsin have likewise held. *See Hoffmeister Cabinets of Nevada, Inc. v. Bivins* (Nev. 1971), 486 P.2d 57, 58; *Voelz v. Milgram Contracting Co.* (Wis. 1956), 75 N.W.2d 305, 306 (holding that the Miller Act is the exclusive remedy only to an action brought "on the bond" and not to some other suit not based on the bond directly).

¶ 77 Similarly, the United States District Courts in California, Texas and Massachusetts are in agreement. *See United States v. Wausau Insurance Cos.* (E.D. Cal. 1991), 755 F.Supp. 906, 909; *Alvarez v. Insurance Co. of North America* (N.D. Cal. 1987), 667 F.Supp. 689, 693-95; *United States v. Robert E. McKee, Inc.* (N.D. Tex. 1988),

702 F.Supp. 1298, 1302; *United States v. Sovereign Constr. Co.* (D. Mass.), 311 F.Supp. 371, 372.

¶ 78 Finally, in another important ruling, the Eighth Circuit Court of Appeals has held that the Davis-Bacon and Miller Acts have different and independent aims, and do not, either explicitly or implicitly, limit one another. *See United States v. W.H. Cates Constr. Co. Inc.* (8th Cir. 1992), 972 F.2d 987, 992.

¶ 79 I would likewise conclude that the Miller Act is not the exclusive remedy to Workers in the present situation, subject to any actual frustration by state law remedies of the purposes or goals of either the Miller Act or the Davis-Bacon Act. A breach of contract remedy under Montana state law, however, does not frustrate or impede the goal of the Miller Act to create a substitute lien via right of bond action against a surety. In both a Miller Act action or breach of contract action, Workers are provided with a remedy to receive unpaid wages which are due. Based on the foregoing, I conclude that workers are free to pursue their state law claims for breach of contract.

¶ 80 For the above reasons, I concur with the result reached by the majority and also conclude that the Miller Act remedy, provided in 40 U.S.C. § 276a-2(b) of the Davis-Bacon Act, is not the exclusive remedy to Workers in this case, but that Workers are free to pursue their breach of contract action under Montana state law.

/s/ Jim Rice
Justice

Justice Terry N. Trieweiler concurring and dissenting.

¶ 81 I concur with the result of the majority Opinion and with much of what is said in that Opinion. However, I also conclude that the majority has unnecessarily and, contrary to our prior decisional law, limited the effect of its Opinion, thereby depriving other aggrieved workers of its benefit. From those limitations placed on this Opinion, I dissent.

¶ 82 I agree with what is said in Justice Rice's concurring Opinion except for his conclusion that an employee cannot sue directly to enforce his rights provided by the Davis-Bacon Act. However, I would resolve the issue in this case more directly and without the inference that there was an effective administrative remedy available to the Plaintiffs pursuant to the Davis-Bacon Act.

¶ 83 As noted by the majority, the contract between American Renovation and Construction Company and the United States Air Force required not only that ARC pay its laborers' prevailing wages pursuant to the Davis-Bacon Act, but also required that ARC require its subcontractors to pay those wages. Assuming the Plaintiffs' allegations to be correct, it did not do so.

¶ 84 The question in this case was not, as decided by the District Court, whether the Davis-Bacon Act provides a direct cause of action pursuant to the Supreme Court's analysis in *Cort v. Ash* (1975), 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26. (Although I would hold as in *McDaniel v. University of Chicago* (7th Cir. 1977), 548 F.2d 689, *cert. den'd.*, 434 U.S. 1033, 98 S.Ct. 765, 54 L.Ed.2d 780, (1978), that it does.) The question is whether the Davis-Bacon Act preempts the Plaintiffs' state remedies such as their claims for breach of contract and negligence. I agree with the majority's analysis of the preemption issue with the

exception that I would not under any circumstance *infer* preemption by federal administrative regulations. The question is whether Congress intended preemption of state law. I do not believe comprehensive administrative regulation could ever shed any light on that issue.

¶ 85 I agree with the result of the majority's preemption analysis. However, I would not limit the conclusion that a common law breach of contract action presents no conflict with the statutory and regulatory scheme of the Davis-Bacon Act to the facts of this case as the majority has done in ¶ 48 of its Opinion. I would conclude that a breach of contract action to enforce those protections provided to workers through the Davis-Bacon Act can never conflict with the Act which the majority concedes was enacted to protect workers on federal construction projects. How could allowing workers to enforce their right to prevailing wages conflict with federal law requiring that they be paid prevailing wages? It seems to me the majority's analysis in that regard is unnecessarily complicated and the majority's conclusion is unnecessarily limited.

¶ 86 Nor do I join in the majority's conclusion at ¶ 33 that Baer and ARC are estopped from arguing that the Plaintiffs failed to exhaust their administrative remedies. I would simply conclude that there were no effective administrative remedies available to the Plaintiffs nor, other than the practical limitations pointed out by Justice Rice (regarding DOL determination of the proper job classification and prevailing wage), is there any requirement in our prior case law that people protected by a federal statutory scheme exhaust that statutory remedy before pursuing an independent state remedy. For the same reason, I disagree with the majority's conclusion in ¶ 35 that the Plaintiffs in this case had an obligation to

make their complaints to the contractor, subcontractor, contracting agency or Department of Labor before bringing a state law action for breach of contract or negligence. While common sense and practicality suggest that those efforts first be made, there is nothing in the law that requires it.

¶ 87 Finally, I strongly disagree with the majority's conclusions in ¶ 56 of the majority Opinion that the Davis-Bacon Act and DOL regulations provide workers an effective remedy for contract violations or that the administrative remedy must be pursued to its intended conclusion. The first conclusion is completely inconsistent with the majority's observations in ¶ 26 and ¶ 29 of its Opinion that only the DOL, contracting agency or private contractor can initiate dispute resolution proceedings regarding the payment of prevailing wages. A regulatory scheme which leaves the rights of workers totally up to federal agencies and their private contractors is no remedy whatsoever to a worker who has been denied his or her prevailing wage.

¶ 88 Finally, once the Court has considered whether the Davis-Bacon Act preempts state law claims, I would conclude it is only necessary to look to our prior case law to determine whether Plaintiffs' claims in this case were properly dismissed. We have already decided this identical issue in *State ex rel. Farm Credit Bank of Spokane v. Dist. Court of Third Jud. Dist.* (1994), 267 Mont. 1, 881 P.2d 594. However, the *Farm Credit* decision is not even mentioned in either the majority Opinion or Justice Rice's concurring Opinion.

¶ 89 In *Farm Credit,* the Plaintiffs filed a state law claim for damages from Farm Credit Bank of Spokane. Among

their claims, Plaintiffs alleged that the Bank breached its contract with them by not complying with the Agricultural Credit Act of 1987, the terms of which were incorporated into the contract between the parties. The District Court dismissed the Plaintiffs' breach of contract claim based on preemption by the Agricultural Credit Act. On appeal, the Bank contended, as does the Defendant in this case, that the District Court should be affirmed because, based on federal authority, there is no direct cause of action available to a borrower for enforcement of the terms of the Agricultural Credit Act. Plaintiffs, on the other hand, pointed out that they were not relying on the creation of a private cause of action to enforce the Agricultural Credit Act. They simply sought to enforce those provisions of the Act which had been incorporated in the terms of their contract with the Bank.

¶ 90 In *Farm Credit,* we first held, as the majority does in this case, that it is not necessary to analyze whether Congress intended to permit a private right of action to enforce the Act. We held that:

> By including reference to the Act as a controlling contract term, the FCB is bound by the terms of the Act under the contract, and the Graveleys have the same right to enforce the provisions of the Act as the parties have to enforce any other provision in the contract.

Farm Credit, 267 Mont. at 17, 881 P.2d at 603.

¶ 91 We pointed out that "while the existence of a private cause of action is correctly analyzed under *Cort v. Ash,* federal preemption is analyzed differently." *Farm Credit,* 267 Mont. at 17, 881 P.2d at 603. Based on the same analytical process employed by the majority in this case,

we concluded that not only was there no conflict between the private cause of action and the Act, but that the private cause of action furthered the purpose of the federal legislation. In relevant language, we stated:

> There is no basis for concluding that simply because Congress provided for a minimum procedure for reviewing a loan officer's decision that it meant to foreclose any other method of enforcing the right to restructure provided for by statute.

Farm Credit, 267 Mont. at 20, 881 P.2d at 605.

¶ 92 We concluded that because the terms of the Act were incorporated by the parties as a term of their contract, those terms were as enforceable in a court of law as any other contract term. *Farm Credit,* 267 Mont. at 20-21, 881 P.2d at 606.

¶ 93 If a minimum procedure for reviewing a loan officer's decision does not foreclose other methods of enforcing rights provided for by contract, certainly the administrative process alluded to by the majority would not foreclose the Plaintiffs' claim in this case. In this case, Plaintiffs did not even have a right to initiate a fact finding process by which to resolve their claim that they were denied the prevailing wage for their job classification.

¶ 94 For these reasons, and based on our prior decision in *Farm Credit,* I would reverse the judgment of the District Court and I concur in the majority's decision to do so. However, I dissent from the majority's unnecessary and legally incorrect limitations on the application of its Opinion. I believe that the majority's limiting language will lead to confusion by future litigants and leave the door

open for future avoidance of what should have been a simple and unequivocal conclusion in this case.

/s/ Terry Trieweiler
Justice

MONTANA EIGHTH JUDICIAL DISTRICT COURT,
CASCADE COUNTY

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BILL FAVEL JOHN PITZER, JOE LAMERE, TOBY LAMERE, and ALVIN BELGARDE,	)	CAUSE NO. BDV-99-657
Plaintiffs,	)	**ORDER**
vs.	)	
AMERICAN RENOVATION AND CONSTRUCTION COMPANY, a California corporation and JOHN DOES I & II,	)	
Defendants.	)	

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This matter was before the Court on May 22, 2001, on the Defendants' Motion to Dismiss. The Plaintiffs were represented by Lawrence Anderson. The Defendants were represented by Marcia Davenport. This decision is based on the briefs and oral arguments of the parties.

The Plaintiffs have brought suit against the Defendants alleging six causes of action; breach of contract, negligence, wrongful discharge, class action, malice, and private attorney/common fund. All of the causes of action are based on the Davis-Bacon Act. The Davis-Bacon Act if [sic] a federal act which specifies what wages are to be paid for what job classifications on federal construction projects. In the instant case the Plaintiffs allege that the Defendants failed to properly classify and pay them for

work they did on the construction of military housing at Malmstrom AFB.

The Plaintiffs have filed a similar suit in the United States District Court for the District of Montana, Great Falls Division. The Plaintiffs' federal suit alleges many of the same claims as the instant case. The main difference between the two cases is that in the federal action the Plaintiffs have named an additional defendant, St. Paul Fire and Marine Insurance Co. St. Paul was the surety for American Renovation and Construction on the military housing project.

On February 1, 2001, Judge Richard F. Cebull issued an order staying the federal proceedings pending a determination by the Department of Labor as to the validity of the Plaintiffs' Davis-Bacon Act claims. In making his ruling, Judge Cebull noted that the Plaintiffs did not have a private right of action under § 1 of the Davis-Bacon Act. However, he also noted that a private right of action is available under § 3 of the Davis-Bacon Act, which allows private rights of action against a surety once the proper procedures of § 1 have been followed and a determination has been made that a violation of the Davis-Bacon Act has occurred. Because St. Paul, the surety, was named in the federal action, Judge Cebull stayed the proceedings pending a determination by the department of Labor as to whether a violation of the Davis-Bacon Act had occurred in regards to the Plaintiffs.

The Defendants have filed their Motion to Dismiss on the basis of this Court's lack of subject matter jurisdiction over the Plaintiffs' claims. The basis of the Defendants' motion is that there is no private right of action under § 1 of the Davis-Bacon Act – that the only private right of

action exists under § 3 of the Davis-Bacon Act, and that § 3 only applies to sureties. As noted by the Defendants, the surety has not been made a party to this action. The Defendants have referred the Court to Judge Cebulls' February 1, 2001, Order as further support of their argument. This Court agrees with Judge Cebull's ruling and finds it persuasive in this case.

The Davis-Bacon Act sets forth a procedure to be followed when any alleged violations of the Act occur. The first step for an aggrieved party is to file the appropriate complaint with the Department of Labor. The Department of Labor conducts an investigation and determines whether or not a violation of the Act occurred. There is a fund created under the Act in which funds are set aside by the government from monies owed to the contractors by the government. The purpose of the fund is to have monies available to settle claims if it is determined by the Department of Labor that a violation of the Davis-Bacon Act has occurred. If it is then determined that the payments withheld in the fund are insufficient to compensate any aggrieved parties, the aggrieved parties can initiate a private action against a contractor's surety to recover any sums still owing. The action filed against a surety is under § 3 of the Davis-Bacon Act and is termed a Miller Act claim.

The Plaintiffs have attempted to make a distinction between the general jurisdiction of Montana state courts and a federal private right of action. The Montana Supreme Court has previously addressed this issue and has found a similar distinction to be without merit. In *State Medical Oxygen & Supply, Inc. v. American Medical Oxygen Co.,* 230 Mont. 456, 750 P.2d 1085 (1988), the plaintiff sued to recover damages from an ex-employee and

the directors of the defendant for the alleged breach of an employment contract based upon a purported violation of a provision of the Social Security Act. The trial court granted summary judgment in favor of the defendant on the basis that a Federal Securities Act violation does not give rise to a private civil cause of action. The Montana Supreme Court affirmed the trial court stating:

> [A]ppellant claims that it is not asserting a federal claim but a claim under § 27-1-202, MCA, and that a breach of federal statute comes within the context of the Montana statute. We cannot agree with this argument. [A] private right of action is not available to appellate through an alleged violation of a federal statute unless certain criteria are met.
>
> First, is the plaintiff "one of a class for whose *especial* benefit the statute was enacted," . . . that is, does the statute create a federal right in favor of the Plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in and [sic] area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? *State Medical Oxygen, supra,* 230 Mont. at 460, 750 P.2d at 1087, citing *Cort v. Ash,* 422 U.S. 66 at 78, 95 S.Ct. 2080 at 2088, 45 L.Ed.2d 26 at 36 (1975).

The Montana Supreme Court considered the first factor of the four-part test and stated:

> We conclude that the plaintiff is not of the class for whom this act was enacted and therefore hold, that as to the issue of a violation of the Social Security Act giving rise to a private cause of action pursuant to § 27-1-202, MCA, summary judgment was properly granted in favor of respondents. *Id.*, 230 Mont. at 460, 750 P.2d at 1087-1088.

This Court has applied the first prong of the above four-prong test to the facts of this case to determine whether the Davis-Bacon Act confers a private right of action to employees for alleged violations of the Act. In applying said test, the Court finds that no private right of action is created under § 1 of the Davis-Bacon Act. "The Davis-Bacon Act was intended as a 'general prohibition or command to a federal agency' to require minimum wage stipulations for federal government work contracts; it does not generally grant a private cause of action directly to employees." *Operating Engineers v. JWJ Contracting Company,* 135 F.3d 671 at 676 (9th Cir. 1998).

Since the Court finds that the first prong of the four-prong test has not been met and that, therefore, a private right of action is not available in state court for an alleged violation of § 1 of the Davis-Bacon Act, the Defendants' Motion to Dismiss is granted. However, the Court also recognizes that the Plaintiffs potentially have a private right of action under § 3 of the Davis-Bacon Act. Therefore, the Court is dismissing this matter without prejudice so that the Plaintiffs, pending a determination of their claims by the Department of Labor, may reinstatute [sic] this action and name St. Paul, American Renovation and Construction's surety, as a party if they feel that a Miller Act claim exists.

There were other motions of the parties pending before the Court. Because the Court has found the Defendants' Motion to Dismiss dispositive of the case, those motions will not be addressed.

IT IS HEREBY ORDERED that:

1. The Defendants Motion to Dismiss is GRANTED.

2. The matter is dismissed without prejudice as noted above.

3. The June 19, 2001, and June 20, 2001, hearings scheduled in this matter are VACATED due to the Court's above ruling.

DATED this 12th day of June, 2001.

/s/ Julie Macek
JULIE MACEK
DISTRICT COURT JUDGE

cc: Lawrence Anderson
Marcia Davenport

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

UNITED STATES OF AMERICA, for the use of BILL FAVEL, JOHN PITZER, JOE LAMERE, TOBY LAMERE, and ALVIN BELGARDE, Plaintiffs, v. ST. PAUL FIRE AND MARINE INSURANCE CO., a Minnesota corporation; AMERICAN RENOVATION AND CONSTRUCTION Co., a California corporation; and JOHN DOES I and II, Defendants.	CV-00-60-RFC-GF ORDER (Filed Feb. 2, 2001)

This is a case involving a contract between the United States and American Renovation and Construction (ARC) for construction of family housing at Malmstrom. Defendant ARC was the primary contractor, defendant Baer a subcontractor[1], and St. Paul is ARC's surety who provided a bond for the project in accordance with the Miller Act, 40 U.S.C. § 270. Plaintiffs here are individuals who were at

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[1] Baer did not actually brief the issue, but joined in ARC/St. Paul's motion to dismiss and brief in support.

one time employed by defendant Baer Construction, which has its own Miller Act claim against St. Paul/ARC.[2]

Plaintiffs claim jurisdiction pursuant to the Miller Act, 40 U.S.C. § 270, and defendants filed a motion to dismiss for lack of subject matter jurisdiction, pursuant to Rule 12(b)(1). The defendants requested and received, without opposition from plaintiffs, a stay in discovery given the potential dispositive nature of their motion. Defendants further filed a motion to dismiss Count III, which alleges the complaint as a class action. The motions were briefed and oral argument was heard on January 29, 2001. For the reasons given more fully below, the motion to dismiss for lack of subject matter jurisdiction is denied, the motion to dismiss Count III is granted, and the case is stayed pending further proceedings before the Department of Labor (DOL).

Defendants first contend that while the Complaint contains a jurisdictional statement that this action is brought pursuant to the Miller Act, the claims are in essence alleged violations of the Davis-Bacon Act, for which no private right of action exists. Second, the defendants argue that even if the Court were to construe the complaint as a claim under the Miller Act, plaintiffs' failure to observe procedural requirements for filing a Miller Act claim merit dismissal.

Although the defendants have brought the motion, the burden of establishing subject matter jurisdiction is borne by plaintiff. Since federal Courts are courts of limited

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[2] Baer Construction v. ARC/St. Paul, CV-00-12-GF-RFC

jurisdiction, the Court must presume lack of jurisdiction until plaintiffs prove otherwise, since it is plaintiffs who are invoking federal jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of America,* 511 U.S. 375, 377 (1994). I find that the plaintiffs have met that burden, in that a Miller Act action exists *within* the structure of the Davis-Bacon Act.

Paragraph 1 of the Complaint is a jurisdictional statement asserting the existence of a federal question (28 U.S.C. § 1331) and relying on the Miller Act, 40 U.S.C. § 270(b). There is no dispute that this Court has jurisdiction over Miller Act claims, which provides that "every person who has furnished labor or material in the prosecution of work . . . shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of suit." *Id.*

The gravamen of the Complaint is contained in Count I, wherein plaintiffs allege breach of contract. The thrust of the allegations in Count I is defendants' failure to properly classify plaintiffs by their skilled trades and pay them in accordance with the requirements of the Davis-Bacon Act – essentially, a claim for back wages. Count II is a pendent claim (wrongful discharge), and Count III realleges all paragraphs as a class action, relying on Rule 23. A fair reading of the Complaint supports defendants' view that the claims are premised on alleged violations of the Davis-Bacon Act. The import of this is that the Davis-Bacon Act does not provide for a private right of action under the circumstances provided here – at least not at this time. The Act provides that the United States Comptroller may withhold payments from contractors and directly pay workers "any wages found to be due." 40 U.S.C. § 276a-2.

The majority of courts interpreting the Davis Bacon Act, including the Ninth Circuit Court of Appeals, have found that no private right of action is created by Section 1 of the Act. "The Davis-Bacon Act was intended as a 'general prohibition or command to a federal agency' to require minimum wage stipulations for federal government work contracts; it does not generally grant a private cause of action directly to employees." *Operating Engineers v. JWJ Contracting Co.*, 135 F.3d 671, 676 (9th Cir. 1998) (internal cites omitted). This holding was in agreement with "the majority of circuit courts that have reached the issue" following the reasoning in *Universities Research Association v. Coutu,* 450 U.S. 754 (1980), in which the Supreme Court stopped just short of reaching the broad issue of whether any private right of action exists under the Davis-Bacon Act. *Coutu,* at 769.

Plaintiffs rely primarily on a decision from the Seventh Circuit and other district court cases relying on that case to support their contention that the Davis-Bacon Act does contain a private right of action. *McDaniel v. University of Chicago,* 548 F.2d 689 (7th Cir. 1976). The case predates *Coutu,* is at odds with the Ninth Circuit holding in *Operating Engineers,* and does not control the issue presented here.

However, defendants' position that no private right of action exists under the Davis-Bacon Act is not well-reasoned. Should workers find that insufficient funds were withheld by the United States to satisfy Davis-Bacon Act claims, a remedy nonetheless must exist for those workers in order to achieve Congressional intent that workers on federal projects be paid prevailing wages. I find that plaintiffs have a private right of action that is contained within Section 3 of the Davis Bacon Act, codified at 40

U.S.C. § 276a-2(b).[3] Section 3 allows what appears to be a Miller Act action against a contractor and his surety "if the accrued payments withheld under the terms of the contract . . . are insufficient to reimburse" the workers found to have been underpaid. *See Peatross v. Global Associates,* 849 F.Supp. 746 (D.Hawaii, 1994).

Plaintiffs' difficulty is that this condition precedent has yet to be satisfied. Beyond the contracting officer for the Air Force informing ARC that it had found misclassifications and under payments to twelve employees who are plaintiffs in this action, no other administrative determination was ever made. Disputes over classifications and payment "shall be resolved in accordance with the procedures of the Department of Labor." 29 C.F.R. § 5.5. All questions regarding classification and disputes over rates of pay "shall be referred to the Administrator for appropriate ruling or interpretation." 29 C.F.R. § 5.13.

In the plaintiffs' Memorandum (docket # 57, p. 19), they request that if this Court concludes that the Department of Labor must first make its determination on the Davis-Bacon Act claims, then the Court stay this action pending such determination rather than dismiss the claim. This course is legally correct, and is effectively supported by defendants in their reply brief (docket # 60, p. 5) wherein they list the practical difficulties for jury understanding at trial absent a DOL determination, and in their further reply to the motion to dismiss Count III

[3] Cases cited to by the parties on the issue of whether a private right of action exists under Davis-Bacon focused on Section 1 of the Act.

(docket # 80, p. 5) wherein they state "without a determination by the Department of Labor that there has been a Davis-Bacon Act violation, plaintiffs have no Miller Act claim."

Finally, as previously mentioned, defendants argue in the alternative that the action should be dismissed for plaintiffs' failure to follow the procedural requirements of a Miller Act claim. Whether the notice requirements were met before filing this action presents mixed questions of law and fact better made as a motion for summary judgment. They do not fit within the confines of a motion to dismiss for lack of subject matter jurisdiction, and are not alternative grounds for dismissal under Rule 12(b)(1).

In conclusion, a determination must first be made by the Department of Labor as to whether Davis-Bacon Act violations occurred, and to what extent. If violations were present, and if payments to the contractor withheld by the United States are insufficient to compensate the plaintiffs, the Davis-Bacon Act allows this action for recovery from the surety.

As for Count III, defendants seek to have the class action count dismissed, arguing that Rule 23 does not govern Davis-Bacon Act claims. Defendants argue that the action is governed by the "opt-out" procedures of the Portal to Portal Act, 29 U.S.C. § 255. This claim is a hybrid of sorts – a Miller Act claim authorized by Section 3 of the Davis-Bacon Act. Plaintiffs argue that the court is under a duty to certify a class, but that is not a correct statement of law. Moreover, plaintiffs reliance on *Hoffman-LaRoche v. Sperling*, 493 U.S. 165 (1989) is unavailing. Rather than create such a duty as plaintiffs suggest, the Court in *LaRoche* simply held that courts have discretion to

facilitate notice to potential plaintiffs in a claim brought under the Age Discrimination in Employment Act.

As a practical matter, the class could not be so numerous that simple joinder pursuant to Rule 20 would not ensure that all potential plaintiffs here are given the opportunity to join the suit. Indeed, since a determination must be made by DOL before this action can further proceed, the employment records will establish the set of workers who may be potential plaintiffs.

Accordingly, **IT IS HEREBY ORDERED** that:

1) defendants' 12(b)(1) motion to dismiss for lack of subject matter jurisdiction (docket # 53) is **DENIED**;

2) defendants' motion to dismiss Count III (docket # 70) is **GRANTED**, subject to plaintiffs being allowed to amend the complaint to join other parties pursuant to Rule 20 following the DOL inquiry;

3) this action is **STAYED** pending a Davis-Bacon determination by the DOL;

4) the parties shall provide a joint status report by May 1, 2001 and every 3 months thereafter during the stay in the case;

5) the final pretrial conference set for April 12, 2001 and the trial set to begin April 23, 2001 are **VACATED**.

DATED this 1st day of February, 2001.

/s/ Richard F. Cebull
Richard F. Cebull
United States
Magistrate Judge

Lawrence A. Anderson
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Attorney for Plaintiff

**EIGHTH JUDICIAL DISTRICT COURT,
CASCADE COUNTY**

BILL FAVEL, JOHN PITZER, JOE LaMERE, TOBY LaMERE, and ALVIN BELGARDE, Plaintiffs, vs. AMERICAN RENOVATION AND CONSTRUCTION CO., a California corporation; JOHN DOES I and II Defendants.	Cause No. BDV-99-657 **AMENDED COMPLAINT AND JURY DEMAND**

COMES NOW the Plaintiffs, and for their cause of action against the Defendants, allege and state as follows:

GENERAL ALLEGATIONS

1. The Plaintiffs are residents of the State of Montana.

2. Defendant American Renovation and Construction Co. is a California corporation which does business in the state of Montana.

3. Defendant American Renovation and Construction Co. has a contract with the United States of America and/or its agencies to design/build military family housing at Malmstrom AFB in Cascade County, Montana, and has performed construction work under this contract since March 1998 in Cascade County, Montana.

4. John Doe I does business as Baer Construction. However, Baer Construction is not a legal entity authorized to do business in the state of Montana, and therefore its legal name is unknown at this time, but will become known in the course of this litigation.

5. John Doe I is a sub-contractor of American Renovation and Construction Company in its construction of new family housing at Malmstrom AFB in Cascade County, Montana.

6. John Doe II does business as Four Winds Construction. However, Four Winds Construction is not a legal entity authorized to do business in the state of Montana, and therefore its legal name is unknown at this time, but will become known in the course of this litigation.

7. John Doe II is a sub-contractor of American Renovation and Construction Company in its construction of new family housing at Malmstrom AFB in Cascade County, Montana.

COUNT NO. 1

BREACH OF CONTRACT

8. Plaintiffs reallege and incorporate by reference paragraphs 1 through 7 above as if fully set forth herein.

9. The Plaintiffs were employees of Defendants John Does I and II under the contract of Defendant American Renovation and Construction Company with the United States of America to construct military family housing at Malmstrom AFB in Cascade County, Montana, under the construction contract starting March 16, 1998.

10. The Plaintiffs are intended beneficiaries of the contract by and between American Renovation and Construction and the United States of America.

11. American Renovation and Construction Company's contract with the government obligated American Renovation to pay laborers working on the project in accordance with the Davis-Bacon Act, including the Act's prevailing wage rate requirements.

12. The sub-contracts of Defendants John Does I and II with Defendant American Renovation Co. also required said sub-contracts to pay laborers working on the project in accordance with the Davis-Bacon Act, including the provisions of the Act requiring that persons employed on federally-funded construction projects be compensated at the rate prevailing for comparable work in the area (40 U.S.C. § 276, etc.).

13. Plaintiffs were working under wage classifications for iron workers, carpenters and cement masons, and other skilled tradesmen; yet, contrary to the provisions of the Davis-Bacon Act and the American Renovation and

Construction Co. contract with the government, Plaintiffs were only being paid as unskilled laborers.

14. The Defendants have failed to properly classify the Plaintiffs; and as a result, have failed to pay wages and have failed to pay wages when due in violation of provisions of § 39-3-206 M.C.A.; and, as a result, the Plaintiffs are entitled to recover unpaid wages and penalties in the amount of 110% of the wages due and unpaid.

15. As a result of the Defendants' failure to pay wages when due, the Plaintiffs have been required to retain counsel to maintain this suit for the collection of wages; and as a result, Plaintiff's are entitled to recover their attorney's fees and costs incurred herein under the provisions of § 39-3-214, M.C.A.

WHEREFORE, the Plaintiffs pray for relief as more fully set forth in the Prayer for Relief.

COUNT NO. 2

NEGLIGENCE

16. Plaintiffs reallege and incorporate by reference paragraphs 1 through 15 above as is fully set forth herein.

17. Under the Davis-Bacon Act and the U.S. Department of Labor regulations, Defendant American Renovation and Construction Company had a duty to it's [sic] own employees and to the employees of it's [sic] subcontractors to pay prevailing wages and to monitor subcontractors to assure that prevailing wages were paid.

18. Defendant American Renovation and Construction Company failed to use reasonable care to pay its

employees and employees of its subcontractors prevailing wages and benefits.

19. As a result of Defendant American Renovation and Construction Companies failure to use reasonable care, the Plaintiffs have not been paid the prevailing wages, including fringe benefits as prescribed by federal law.

20. As a result, the Defendant American Renovation and Construction Companies failure to use reasonable care the Plaintiff's have suffered damages including unpaid wages, fringe benefits, and legal penalties.

WHEREFORE, the Plaintiff's pray for relief is more fully set forth in the Prayer for Relief.

COUNT NO. 3

WRONGFUL DISCHARGE

21. Plaintiffs reallege and incorporate by reference paragraphs 1 through 20 above as is fully set forth herein.

22. The Plaintiffs were successfully employed by Defendant Baer Construction Co.

23. The Plaintiffs reported to Defendant Baer Construction Co. and Defendant American Renovation and Construction their objections to the improper wage rates they were being paid in violation of the prevailing wage provisions of the Davis-Bacon Act.

24. Defendants Baer Construction, in retaliation for Plaintiffs' complaints, terminated their employment.

25. Defendant American Renovation and Construction Co. had a duty to its own workers and to the workers

of subcontractors to pay prevailing wages under the Davis-Bacon Act.

26. Defendant American Renovation and Construction Co. knew or should have known that Plaintiffs were being terminated in retaliation for their complaints to John Doe I and to American Renovation and Construction Co. in regard the violations of the Davis-Bacon Act.

27. Defendant American Renovation and Construction Co. had the power and the duty to prevent Defendants John Doe I's violations of the Davis-Bacon Act, and to prevent the Plaintiffs' termination by Defendant John Doe I; and American Renovation Construction Co. neglected and/or refused to prevent Defendant John Doe I's wrongful conduct.

28. Defendants John Doe I and American Renovation and Construction Co., jointly and severally, knew that their conduct would injure and did injure the Plaintiffs, and proceeded to act in spite of their knowledge that their wrongful conduct would cause injury to the Plaintiffs.

29. As a result of the Defendants' wrongful conduct herein, the Plaintiffs have suffered damages in an amount to be proved at trial.

WHEREFORE, Plaintiffs pray for relief as more fully set forth in the Prayer for Relief.

COUNT NO. 4

CLASS ALLEGATIONS

30. Plaintiffs reallege and incorporate by reference paragraphs 1 through 29 above as if fully set forth herein.

31. Plaintiffs bring this action pursuant to the provisions of Rules 23(a) and 23(b)(3) of the Montana Rules of Civil Procedure as a class action for themselves and as representatives of and on behalf of all other persons similarly situated, to wit: all employees of American Renovation and Construction Co. and the employees of the subcontractors of American Renovation and Construction Co.'s contract with the government of the United States of America to build military housing at Malmstrom AFB in Cascade County, Montana, who are subject to the prevailing wage provisions of the Davis-Bacon Act, who have not been paid proper wages in violation of the Davis-Bacon Act.

32. This class action satisfies the prerequisites set forth in Rule 23(a) for maintaining a class action:

(a) the class is so numerous that joinder of all members is impracticable;

(b) There are questions of law and fact common to the class, to wit, whether American Renovation and Construction Co. and its subcontractors down-classified skilled tradespersons to common labor rates in violation of the Davis-Bacon Act; and whether American Renovation and Construction Company, failed to use reasonable care in the payment of wages and fringe benefits to it's [sic] employees and subcontractors employees.

(c) The Plaintiffs' claims in Count No. 1 herein are typical of the class, to wit: Plaintiffs are employees of subcontractors of American Renovation and Construction Co., and said employees have been paid common labor rates for skilled trades work, in violation of the Davis-Bacon Act.

(d) The Plaintiffs will fairly and adequately protect the interests of the class.

33. In addition, Defendant American Renovation and Construction Co. has acted or refused to act on grounds generally applicable to the class.

34. Further, the questions of law or fact common to the members of the class predominate over any questions effecting [sic] individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

WHEREFORE, the Plaintiffs pray for relief as more fully set forth in the Prayer for Relief.

COUNT NO. 5

MALICE

35. Plaintiff's [sic] reallege and incorporate by reference paragraphs 1 through 34 above as if fully set forth herein.

36. Defendant American Renovation and Construction Company had knowledge that it and subcontractors were not paying wages and fringe benefits as prescribed by law.

37. Defendant American Renovation and Construction Company had knowledge that its employees and the employees of subcontractors would be injured by its and its subcontractors failure to pay prevailing wages and fringe benefits as required by law.

38. Defendant American Renovation and Construction Company deliberately proceeded to act in conscience or in intentional disregard or deliberately proceeded to act

with indifference to the high probability of injury to the Plaintiffs and all other similarly situated as a result of its failure to pay prevailing wages and fringe benefits as required by law.

WHEREFORE, Plaintiffs pray for relief is more fully set forth in the Prayer for Relief.

COUNT NO. 6

PRIVATE ATTORNEY GENERAL/COMMON FUND

39. Plaintiffs reallege and corporate by reference paragraphs 1 through 38 as if fully set forth herein.

40. Defendant American Renovation and Construction Company has failed to pay its employees and its subcontractors employees or has failed to use reasonable care to see that its employees and subcontractors employees are paid the prevailing rates of wages and benefits as prescribed by law.

41. The United States of America has declined or failed to enforce the provisions of the Davis-Bacon Act to ensure that all employees of American Renovation and its subcontractors are paid the prevailing rates of wages to which they are entitled.

42. Plaintiff's [sic] bring this action on behalf of themselves and all employees of Defendant American Renovation and Construction Company and the employees and all employees of subcontractors for the purpose of creating a common fund for which all such employees similarly situated are paid the wages, fringe benefits and penalties to which they are entitled.

WHEREFORE, the Plaintiffs pray for relief as more fully set forth in the Prayer for Relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for relief as follows:

1. For past-due wages;
2. For penalties as provided by law;
3. For attorney's fees and costs as provided by law;
4. For damages in an amount sufficient to fully compensate the Plaintiffs for their wrongful discharge;
5. For exemplary damages;
6. For certification of this matter as a class action as prescribed by Montana law;
7. For such other and further relief as to [sic] the Court seems just.

JURY DEMAND

Plaintiffs request a trial by jury of all issues triable by jury in this cause.

DATED this 16 day of October, 1999.

Lawrence A. Anderson
Attorney at Law
#18 Sixth Street North
P.O. Box 2608
Great Falls, MT 59403

/s/ Lawrence A. Anderson
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was duly served upon the following by mail, hand delivery, Federal Express, or facsimile transmission, as indicated:

Marcia Davenport
CROWLEY, HAUGHEY, HANSON, TOOLE & DIETRICH, P.L.L.P.
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Neil G. Westesen
CROWLEY, HAUGHEY, HANSON, TOOLE & DIETRICH, P.L.L.P.
P.O. Box 10969
Bozeman, MT 59719-0969

[✓] U.S. Mail
[ ] Federal Express
[ ] Hand Delivery
[ ] Facsimile transmission

DATED this 16 day of October, 2000

/s/ Laura A. Jarvis
Secretary to Lawrence A. Anderson

40 USC Sec. 276a

Sec. 276a. Rate of wages for laborers and mechanics

(a) The advertised specifications for every contract in excess of $2,000, to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works of the United States or the District of Columbia within the geographical limits of the States of the Union or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State in which the work is to be performed, or in the District of Columbia if the work is to be performed there; and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics, and that the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work; and the further stipulation that there may be withheld from the contractor so

much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.

(b) As used in sections 276a to 276a-5 of this title the term "wages", "scale of wages", "wage rates", "minimum wages", and "prevailing wages" shall include –

(1) the basic hourly rate of pay; and

(2) the amount of –

(A) the rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program; and

(B) the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to laborers and mechanics pursuant to an enforcible [sic] commitment to carry out a financially responsible plan or program which was communicated in writing to the laborers and mechanics affected,

for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs, or for other bona fide fringe benefits, but

only where the contractor or subcontractor is not required by other Federal, State, or local law to provide any of such benefits:

Provided, That the obligation of a contractor or subcontractor to make payment in accordance with the prevailing wage determinations of the Secretary of Labor, insofar as sections 276a to 276a-5 of this title and other Acts incorporating sections 276a to 276a-5 of this title by reference are concerned may be discharged by the making of payments in cash, by the making of contributions of a type referred to in paragraph (2)(A), or by the assumption of an enforcible [sic] commitment to bear the costs of a plan or program of a type referred to in paragraph (2)(B), or any combination thereof, where the aggregate of any such payments, contributions, and costs is not less than the rate of pay described in paragraph (1) plus the amount referred to in paragraph (2).

In determining the overtime pay to which the laborer or mechanic is entitled under any federal law, his regular or basic hourly rate of pay (or other alternative rate upon which premium rate of overtime compensation is computed) shall be deemed to be the rate computed under paragraph (1), except that where the amount of payments, contributions, or costs incurred with respect to him exceeds the prevailing wage applicable to him under sections 276a to 276a-5 of this title, such regular or basic hourly rate of pay (or such other alternative rate) shall be arrived at by deducting from the amount of payments, contributions, or costs actually incurred with respect to him, the amount of contributions or costs of the types described in paragraph (2) actually incurred with respect to him, or the

amount determined under paragraph (2) but not actually paid, whichever amount is the greater.

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40 USC Sec. 276a-2

Sec. 276a-2. Payment of wages by Comptroller General from withheld payments; listing contractors violating contracts

(a) The Comptroller General of the United States is authorized and directed to pay directly to laborers and mechanics from any accrued payments withheld under the terms of the contract any wages found to be due laborers and mechanics pursuant to sections 276a to 276a-5 of this title; and the Comptroller General of the United States is further authorized and is directed to distribute a lift to all departments of the Government giving the names of persons or firms whom he has found to have disregarded their obligations to employees and subcontractors. No contract shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have an interest until three years have elapsed from the date of publication of the list containing the names of such persons or firms.

(b) If the accrued payments withheld under the terms of the contract, as aforesaid, are insufficient to reimburse all the laborers and mechanics with respect to whom there has been a failure to pay the wages required pursuant to sections 276a to 276a-5 of this title, such laborers and mechanics shall have the right of action and/or of intervention against the contractor and his sureties conferred by law upon persons furnishing labor or

materials, and in such proceedings it shall be no defense that such laborers and mechanics accepted or agreed to accept less than the required rate of wages or voluntarily made refunds.

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40 USC Sec. 270b

Sec. 270b. Rights of persons furnishing labor or material

(a) Right to sue on payment bond

Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under sections 270a to 270d-1 of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided, however, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom

the labor was done or performed. Such notice shall be served by any means which provides written, third-party verification of delivery. (FOOTNOTE 1) to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(FOOTNOTE 1) So in original. The period probably should not appear.

(b) Civil action; jurisdiction; statute of limitations; costs and expenses

Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.

(c) Nonwaiver of rights

Any waiver of the right to sue on the payment bond required by sections 270a to 270d-1 of this title shall be void unless it is in writing, signed by the person whose right is waived, and executed after such person has first furnished labor or material for use in the performance of the contract.

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40 USC Sec. 270a

Sec. 270a. Bonds of contractors of public buildings or works

(a) Type of bonds required

Before any contract for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of such person. The amount of the payment bond shall be equal to the total amount payable by the terms of the contract unless the contracting officer awarding the contract makes a written determination supported by specific findings that a payment bond in that amount is impractical, in which case the amount of the payment bond shall be set by the contracting officer. In no case shall the amount of the payment bond be less than the amount of the performance bond.

(b) Waiver of bonds for contracts performed in foreign countries

The contracting officer in respect of any contract is authorized to waive the requirement of a performance

bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Authority to require additional bonds

Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

(d) Coverage for taxes in performance bond

Every performance bond required under this section shall specifically provide coverage for taxes imposed by the United States which are collected, deducted, or withheld from wages paid by the contractor in carrying out the contract with respect to which such bond is furnished. However, the United States shall give the surety or sureties on such bond written notice, with respect to any such unpaid taxes attributable to any period, within ninety days after the date when such contractor files a return for such period, except that no such notice shall be given more than one hundred and eighty days from the date when a return for the period was required to be filed under title 26. No suit on such bond for such taxes shall be commenced by the United States unless notice is given as provided in the preceding sentence, and no such suit shall be commenced after the expiration of one year after the day on which such notice is given.

29 C.F.R. § 5.5

Sec. 5.5 Contract provisions and related matters.

(a) The Agency head shall cause or require the contracting officer to insert in full in any contract in excess of $2,000 which is entered into for the actual construction, alteration and/or repair, including painting and decorating, of a public building or public work, or building or work financed in whole or in part from Federal funds or in accordance with guarantees of a Federal agency or financed from funds obtained by pledge of any contract of a Federal agency to make a loan, grant or annual contribution (except where a different meaning is expressly indicated), and which is subject to the labor standards provisions of any of the acts listed in Sec. 5.1, the following clauses (or any modifications thereof to meet the particular needs of the agency, Provided, That such modifications are first approved by the Department of Labor):

(1) Minimum wages. (i) All laborers and mechanics employed or working upon the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project), will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (20 CFR part 3)), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics.

Contributions made or costs reasonably anticipated for bona fide fringe benefits under section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of paragraph (a)(1)(iv) of this section; also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs which cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period. Such laborers and mechanics shall be paid the appropriate wage rate and fringe benefits on the wage determination for the classification of work actually performed, without regard to skill, except as provided in Sec. 5.5(a)(4). Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein: Provided, That the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The wage determination (including any additional classification and wage rates conformed under paragraph (a)(1)(ii) of this section) and the Davis-Bacon poster (WH-1321) shall be posted at all times by the contractor and its subcontractors at the site of the work in a prominent and accessible place where it can be easily seen by the workers.

(ii)(A) The contracting officer shall require that any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. The contracting officer shall approve an additional classification and wage

rate and fringe benefits therefore only when the following criteria have been met:

(1) The work to be performed by the classification requested is not performed by a classification in the wage determination; and

(2) The classification is utilized in the area by the construction industry; and

(3) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

(B) If the contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the contracting officer agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by the contracting officer to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, DC 20210. The Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(C) In the event the contractor, the laborers or mechanics to be employed in the classification or their representatives, and the contracting officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer shall refer the questions, including the views of all interested parties and the recommendation

of the contracting officer, to the Administrator for determination. The Administrator, or an authorized representative, will issue a determination within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(D) The wage rate (including fringe benefits where appropriate) determined pursuant to paragraphs (a)(1)(ii) (B) or (C) of this section, shall be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

(iii) Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the contractor shall either pay the benefit as stated in the wage determination or shall pay another bona fide fringe benefit or an hourly cash equivalent thereof.

(iv) If the contractor does not make payments to a trustee or other third person, the contractor may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program, Provided, That the Secretary of Labor has found, upon the written request of the contractor, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the contractor to set aside in a separate account assets for the meeting of obligations under the plan or program.

(2) Withholding. The (write in name of Federal Agency or the loan or grant recipient) shall upon its own

action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld from the contractor under this contract or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers, employed by the contractor or any subcontractor the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper, employed or working on the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project), all or part of the wages required by the contract, the (Agency) may, after written notice to the contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

(3) Payrolls and basic records. (i) Payrolls and basic records relating thereto shall be maintained by the contractor during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work (or under the United States Housing Act of 1937, or under the Housing Act of 1949, in the construction or development of the project). Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types

described in section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made and actual wages paid. Whenever the Secretary of Labor has found under 29 CFR 5.5(a)(1)(iv) that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in section 1(b)(2)(B) of the Davis-Bacon Act, the contractor shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and the records which show the costs anticipated or the actual cost incurred in providing such benefits. Contractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs.

(ii)(A) The contractor shall submit weekly for each week in which any contractor work is performed a copy of all payrolls to the (write in name of appropriate Federal agency) if the agency is a party to the contract, but if the agency is not such a party, the contractor will submit the payrolls to the applicant, sponsor, or owner, as the case may be, for transmission to the (write in name of agency). The payrolls submitted shall set out accurately and completely all of the information required to be maintained under Sec. 5.5(a)(3)(i) of Regulations, 29 CFR part 5. This information may be submitted in any form desired. Optional Form WH-347 is available for this purpose and may be purchased from the Superintendent of Documents

(Federal Stock Number 029-005-00014-1), U.S. Government Printing Office, Washington, DC 20402. The prime contractor is responsible for the submission of copies of payrolls by all subcontractors.

(B) Each payroll submitted shall be accompanied by a "Statement of Compliance," signed by the contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract and shall certify the following:

(1) That the payroll for the payroll period contains the information required to be maintained under Sec. 5.5(a)(3)(i) of Regulations, 29 CFR part 5 and that such information is correct and complete;

(2) That each laborer or mechanic (including each helper, apprentice, and trainee) employed on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in Regulations, 29 CFR part 3;

(3) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the contract.

(C) The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH-347 shall satisfy the requirement for submission of the "Statement of Compliance" required by paragraph (a)(3)(ii)(B) of this section.

(D) The falsification of any of the above certifications may subject the contractor or subcontractor to civil or criminal prosecution under section 1001 of title 18 and section 231 of title 31 of the United States Code.

(iii) The contractor or subcontractor shall make the records required under paragraph (a)(3)(i) of this section available for inspection, copying, or transcription by authorized representatives of the (write the name of the agency) or the Department of Labor, and shall permit such representatives to interview employees during working hours on the job. If the contractor or subcontractor fails to submit the required records or to make them available, the Federal agency may, after written notice to the contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Furthermore, failure to submit the required records upon request or to make such records available may be grounds for debarment action pursuant to 29 CFR 5.12.

(4) Apprentices and trainees – (i) Apprentices. Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship Training, Employer and Labor Services, or with a State Apprenticeship Agency recognized by the office, or if a person is employed in his or her first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Office of Apprenticeship Training, Employer and Labor Services or a State Apprenticeship

Agency (where appropriate) to be eligible for probationary employment as an apprentice. The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio permitted to the contractor as to the entire work force under the registered program. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated above, shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. Where a contractor is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in the contractor's or subcontractor's registered program shall be observed. Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination. Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator determines that a different practice prevails for the applicable apprentice classification, fringes shall be paid in accordance with that determination. In the event the Office of Apprenticeship Training, Employer and Labor Services, or a State

Apprenticeship Agency recognized by the Office, withdraws approval of an apprenticeship program, the contractor will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(ii) Trainees. Except as provided in 29 CFR 5.16, trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration. The ratio of trainees to journeymen on the job site shall not be greater than permitted under the plan approved by the Employment and Training Administration. Every trainee must be paid at not less than the rate specified in the approved program for the trainee's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed on the wage determination unless the Administrator of the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeyman wage rate on the wage determination which provides for less than full fringe benefits for apprentices. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Employment and Training Administration shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition,

any trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. In the event the Employment and Training Administration withdraws approval of a training program, the contractor will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(iii) Equal employment opportunity. The utilization of apprentices, trainees and journeymen under this part shall be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and 29 CFR part 30.

(5) Compliance with Copeland Act requirements. The contractor shall comply with the requirements of 29 CFR part 3, which are incorporated by reference in this contract.

(6) Subcontracts. The contractor or subcontractor shall insert in any subcontracts the clauses contained in 29 CFR 5.5(a)(1) through (10) and such other clauses as the (write in the name of the Federal agency) may by appropriate instructions require, and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all the contract clauses in 29 CFR 5.5.

(7) Contract termination: debarment. A breach of the contract clauses in 29 CFR 5.5 may be grounds for termination of the contract, and for debarment as a contractor and subcontractor as provided in 29 CFR 5.12.

(8) Compliance with Davis-Bacon and Related Act requirements. All rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 CFR parts 1, 3, and 5 are herein incorporated by reference in this contract.

(9) Disputes concerning labor standards. Disputes arising out of the labor standards provisions of this contract shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

(10) Certification of eligibility. (i) By entering into this contract, the contractor certifies that neither it (nor he or she) nor any person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

(ii) No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government contract by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

(iii) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

(b) Contract Work Hours and Safety Standards Act. The Agency Head shall cause or require the contracting officer to insert the following clauses set forth in paragraphs (b)(1), (2), (3), and (4) of this section in full in any contract in an amount in excess of $100,000 and subject to

the overtime provisions of the Contract Work Hours and Safety Standards Act. These clauses shall be inserted in addition to the clauses required by Sec. 5.5(a) or 4.6 of part 4 of this title. As used in this paragraph, the terms laborers and mechanics include watchmen and guards.

(1) Overtime requirements. No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek.

(2) Violation; liability for unpaid wages; liquidated damages. In the event of any violation of the clause set forth in paragraph (b)(1) of this section the contractor and any subcontractor responsible therefore shall be liable for the unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in paragraph (b)(1) of this section, in the sum of $10 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in paragraph (b)(1) of this section.

(3) Withholding for unpaid wages and liquidated damages. The (write in the name of the Federal agency or the loan or grant recipient) shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any moneys payable on account of work performed by the contractor or subcontractor under any such contract or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime contractor, such sums as may be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in paragraph (b)(2) of this section.

(4) Subcontracts. The contractor or subcontractor shall insert in any subcontracts the clauses set forth in paragraph (b)(1) through (4) of this section and also a clause requiring the subcontractors to include those clauses in any lower tier subcontracts. The prime contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in paragraphs (b)(1) through (4) of this section.

(c) In addition to the clauses contained in paragraph (b), in any contract subject only to the Contract Work Hours and Safety Standards Act and not to any of the other statutes cited in Sec. 5.1, the Agency Head shall cause or require the contracting officer to insert a clause requiring that the contractor or subcontractor shall maintain payrolls and basic payroll records during the course of the work and shall preserve them for a period of three years from the completion of the contract for all laborers and mechanics, including guards and watchmen, working

on the contract. Such records shall contain the name and address of each such employee, social security number, correct classifications, hourly rates of wages paid, daily and weekly number of hours worked, deductions made, and actual wages paid. Further, the Agency Head shall cause or require the contracting officer to insert in any such contract a clause providing that the records to be maintained under this paragraph shall be made available by the contractor or subcontractor for inspection, copying, or transcription by authorized representatives of the (write the name of agency) and the Department of Labor, and the contractor or subcontractor will permit such representatives to interview employees during working hours on the job.

(The information collection, recordkeeping, and reporting requirements contained in the following paragraphs of this section were approved by the Office of Management and Budget:

Paragraph	OMB Control Number
(a)(1)(ii)(B)	1215-0140
(a)(1)(ii)(C)	1215-0140
(a)(1)(iv)	1215-0140
(a)(3)(i)	1215-0140, 1215-0017
(a)(3)(ii)(A)	1215-0149
(c)	1215-0140, 1215-0017

[48 FR 19540, Apr. 29, 1983, as amended at 51 FR 12265, Apr. 9, 1986; 55 FR 50150, Dec. 4, 1990; FR 28776, June

26, 1992; 58 FR 58955, Nov. 5, 1993; 61 FR 40716, Aug. 5, 1996; 65 FR 69693, Nov. 20, 2000]

Effective Date Note: At 58 FR 58955, Nov. 5, 1993, Sec. 5.5 was amended by suspending paragraph (a)(1)(ii) indefinitely.

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29 C.F.R. § 5.11

Sec. 5.11 Disputes concerning payment of wages.

(a) This section sets forth the procedure for resolution of disputes of fact or law concerning payment of prevailing wage rates, overtime pay, or proper classification. The procedures in this section may be initiated upon the Administrator's own motion, upon referral of the dispute by a Federal agency pursuant to Sec. 5.5(a)(9), or upon request of the contractor or subcontractor(s).

(b)(1) In the event of a dispute described in paragraph (a) of this section in which it appears that relevant facts are at issue, the Administrator will notify the affected contractor and subcontractor(s) (if any), by registered or certified mail to the last known address, of the investigation findings. If the Administrator determines that there is reasonable cause to believe that the contractor and/or subcontractor(s) should also be subject to debarment under the Davis-Bacon Act or Sec. 5.12(a)(1), the letter will so indicate.

(2) A contractor and/or subcontractor desiring a hearing concerning the Administrator's investigative findings shall request such a hearing by letter postmarked within 30 days of the date of the Administrator's letter. The request shall set forth those findings which are in

dispute and the reasons therefor, including any affirmative defenses, with respect to the violations and/or debarment, as appropriate.

(3) Upon receipt of a timely request for a hearing, the Administrator shall refer the case to the Chief Administrative Law Judge by Order of Reference, to which shall be attached a copy of the letter from the Administrator and response thereto, for designation of an Administrative Law Judge to conduct such hearings as may be necessary to resolve the disputed matters. The hearing shall be conducted in accordance with the procedures set forth in 29 CFR part 6.

(c)(1) In the event of a dispute described in paragraph (a) of this section in which it appears that there are no relevant facts at issue, and where there is not at that time reasonable cause to institute debarment proceedings under Sec. 5.12, the Administrator shall notify the contractor and subcontractor(s) (if any), by registered or certified mail to the last known address, of the investigation findings, and shall issue a ruling on any issues of law known to be in dispute.

(2)(i) If the contractor and/or subcontractor(s) disagree with the factual findings of the Administrator or believe that there are relevant facts in dispute, the contractor or subcontractor(s) shall so advise the Administrator by letter postmarked within 30 days of the date of the Administrator's letter. In the response, the contractor and/or subcontractor(s) shall explain in detail the facts alleged to be in dispute and attach any supporting documentation.

(ii) Upon receipt of a response under paragraph (c)(2)(i) of this section alleging the existence of a factual

dispute, the Administrator shall examine the information submitted. If the Administrator determines that there is a relevant issue of fact, the Administrator shall refer the case to the Chief Administrative Law Judge in accordance with paragraph (b)(3) of this section. If the Administrator determines that there is no relevant issue of fact, the Administrator shall so rule and advise the contractor and subcontractor(s) (if any) accordingly.

(3) If the contractor and/or subcontractor(s) desire review of the ruling issued by the Administrator under paragraph (c)(1) or (2) of this section, the contractor and/or subcontractor(s) shall file a petition for review thereof with the Administrative Review Board within 30 days of the date of the ruling, with a copy thereof [sic] the Administrator. The petition for review shall be filed in accordance with part 7 of this title.

(d) If a timely response to the Administrator's findings or ruling is not made or a timely petition for review is not filed, the Administrator's findings and/or ruling shall be final, except that with respect to debarment under the Davis-Bacon Act, the Administrator shall advise the Comptroller General of the Administrator's recommendation in accordance with Sec. 5.12(a)(1). If a timely response or petition for review is filed, the findings and/or ruling of the Administrator shall be inoperative unless and until the decision is upheld by the Administrative Law Judge or the Administrative Review Board.

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29 C.F.R. § 5.13

Sec. 5.13 Rulings and interpretations.

All questions relating to the application and interpretation of wage determinations (including the classifications therein) issued pursuant to part 1 of this subtitle, of the rules contained in this part and in parts 1 and 3, and of the labor standards provisions of any of the statutes listed in Sec. 5.1 shall be referred to the Administrator for appropriate ruling or interpretation. The rulings and interpretations shall be authoritative and those under the Davis-Bacon Act may be relied upon as provided for in section 10 of the Portal-to-Portal Act of 1947 (29 U.S.C. 259). Requests for such rulings and interpretations should be addressed to the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, DC 20210.

Supreme Court, U.S.
FILED
MAR 28 2003
OFFICE OF THE CLERK

(2)

No. 02-1262

In the

Supreme Court of the United States

AMERICAN RENOVATION AND CONSTRUCTION COMPANY,

Petitioner,

v.

BILL FAVEL, JOHN PITZER, JOE LaMERE TOBY LaMERE and ALVIN BELGARDE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

RESPONDENTS' BRIEF IN OPPOSITION

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Counsel of Record
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QUESTION PRESENTED

Does the Davis-Bacon Act preempt state common-law claims for breach of contract, where workers have exhausted all administrative remedies and the employer is estopped to contest its underpayment of wages?

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STATEMENT OF THE CASE

Petitioner American Renovation and Construction Company (ARC) was the general contractor for construction of housing units at Malmstrom Air Force Base in Montana. ARC signed a contract with the U.S. Air Force, agreeing that all workers would be paid prevailing wages under the Davis-Bacon Act.

Respondents are manual laborers who worked for ARC's subcontractors. The work they performed is classified for Davis-Bacon purposes as "iron worker," "carpenter," or other "skilled trade" work. However, the workers all were paid at lower unskilled-laborer rates.

The workers complained about their wages to the subcontractor, and were fired. They complained to ARC without success. Meanwhile, ARC repeatedly represented to the Air Force that all workers were being paid Davis-Bacon rates.

The workers complained to the U.S. Air Force contracting officer. She concurred with their complaint, and sent ARC a tabulation of underpayments, citing Department of Labor (DOL) wage guidelines. ARC did not contest these findings, and acknowledged their validity in subsequent correspondence.

Respondents meanwhile had gone to work for another subcontractor on the project, and were still being underpaid. ARC applied to the DOL to reclassify job descriptions at lower wage rates. The Air Force, in consultation with DOL, refused to grant this request. ARC made no attempt to seek additional review by the DOL.

The workers sued ARC for breach of contract in Montana state district court. The court dismissed their complaint for lack of subject matter jurisdiction. It held that the Davis-Bacon Act creates no private right of action. The court ignored the workers' contention that their claim was at common law, and that the issue was whether the federal Act preempted state common-law claims.

The Montana Supreme Court reversed the district court and reinstated the claim. It held that, under the facts of the present case, the Davis-Bacon Act did not preempt a common-law claim.

The Montana Supreme Court repeatedly emphasized that the workers had exhausted all administrative remedies, and that ARC had not sought any further administrative review. It held, *inter alia:*

> ¶ 31 The Workers took all the proper steps in their attempt to resolve this matter. The first step, complaining to Baer, got them fired. The second step, complaining to ARC, appeared to fall on deaf ears for several months. Finally, the third step, USAF involvement, resulted in a determination by the Contracting Officer authorized to make such a determination, that Baer and ARC were in violation of the Davis-Bacon provisions of their contracts.
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> * * *
>
> ¶ 32 Every decision made by the USAF supported the Workers' claims. From the Workers' perspective, there was no dispute of fact or law as to the proper classification

and wage rate due the Workers. The Air Force calculated that and set it forth in a letter for ARC.

* * *

¶ 33 In sum, neither ARC nor Baer have demonstrated that any further administrative review was either necessary or available to the compiaining Workers under the clear-language of 29 C.F.R. § 5.11. Moreover, they have failed to even argue that such further administrative review would or should have resulted in a different conclusion than that drawn by the USAF Contracting Officer. On these facts, we therefore conclude that ARC and Baer are estopped from arguing that Workers failed to seek administrative review of the dispute. (Pet. App. 17-18 (emphasis added))

ARGUMENT

Petitioner misrepresents the Montana Supreme Court's holding in several respects. It misrepresents the court's analysis to assert a "conflict" with holdings of this Court and of other courts. It also misrepresents the implications of the Montana decision. These points will be explained below.

I. THE PETITION MISCONSTRUES THE MONTANA SUPREME COURT'S ANALYSIS.

ARC's Petition implies repeatedly that the Montana Supreme Court held "that the Davis-Bacon Act provide[s] a

private right of action." (Pet., p. 10; *see also* 12-13, 14-15, 17) On this basis, it alleges a "conflict" between the Montana decision and various cases which have held that there is no such implied private right of action. (*See id.*)

In fact, the Montana court expressly declined to decide whether there is a private right of action under the Act. (*See* Pet. App. 29, ¶ 54) Instead, the court inquired whether the Davis-Bacon Act preempts a state common law action for breach of contract, based on a contractor's promise to pay its workers Davis-Bacon wages.

This is a crucial analytical distinction. Private right of action analysis (as to whether Congress intended to create a right) is governed by the four-factor test of *Cort v. Ash*, 422 U.S. 66 (1975). Preemption analysis (as to whether Congress meant to prohibit common law actions) is governed by quite different considerations. *See, e.g., Medtronic, Inc., v. Lohr*, 518 U.S. 470, 484-486 (1996).

Preemption analysis "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.*, at 485. This presumption in favor of common law actionability has no analogue under *Cort*. Thus, courts can find that Congress left state rights of action intact even though it intended no corresponding federal right of action under a statute.

In the present case, the Montana court painstakingly followed this Court's preemption guidelines. (Pet. App. 19-28, ¶¶ 37-52) It thoroughly scrutinized both the Davis-Bacon Act and its regulations for evidence of preemptive intent. The court concluded that "[u]nder the circumstances presented here . . . a state remedy does not

stand as an obstacle to the accomplishment and execution of the Davis-Bacon Act." (*Id.*, at ¶ 52)

The Montana court's analysis is unimpeachable. The various alarms and remonstrances raised in the Petition have no merit. This will be demonstrated below.

II. THE PETITION MISREPRESENTS THE IMPLICATIONS OF THE MONTANA SUPREME COURT'S ANALYSIS.

ARC's Petition makes several sweeping representations about the impact of the Montana Supreme Court's holding. These representations fly in the face of the Montana court's language and logic. Here are some notable examples:

A. "The decision allows federal laborers to completely side-step the administrative process." (Pet., p. 9) This is a startling assertion, since the Montana court insisted throughout its opinion that workers must comply with the administrative process. Thus, *e.g.*, the Court stressed that "the administrative procedure, when available and not otherwise exhausted, must be routinely pursued to its intended conclusion." (Pet. App. 30, ¶ 56) In the present case, it held that the workers "took all the proper steps" and "exhausted their administrative remedies." (¶¶ 31, 36, 57) It stressed that ARC had failed to show "that any further administrative review was either necessary or available." (¶ 33) There is nothing whatever in the opinion suggesting

that laborers can "side-step the administrative process."

B. **"[S]tate district court judges and juries will decide the complex wage determinations that Congress has declared are within the exclusive jurisdiction of the Department of Labor."** (Pet., p.9) Again, the Montana court emphatically stressed precisely the opposite point. The court repeatedly pointed out that wage determinations were made in this case, in accordance with regulations, by the federal contracting agency in concert with the DOL. (*See* Pet. App. 12-30, ¶¶ 21, 23, 31, 32, 38, 49, 57) For this reason, the court expressly observed, "there are no disputed facts that require the specialized expertise of DOL." (¶ 38) Nothing in the opinion remotely suggests that state judges or juries should make wage determinations that are within the DOL's exclusive control.

C. **"The Montana Supreme Court's decision . . . conflicts with the decisions of at least four circuit courts of appeals . . ."** (Pet., pp. 9-10) Petitioner contends that the Montana court's holding "is in direct conflict with the decisions of the Second, Third, Fifth and Ninth Circuits." (Pet., p. 10) With one exception, however, these cases do not address the issue here. They hold that there is no implied private right of action under

the Davis-Bacon Act[1] - a question which the Montana court expressly declined to consider. (Pet. App. 29, ¶ 54)

The sole federal case in conflict with the Montana court's decision is *Grochowski v. Phoenix Const.*, 318 F.3d 80 (2nd Cir. 2003). *Grochowski*'s 2-1 majority declined to recognize a common-law right of action quite perfunctorily, without any systematic preemption analysis at all. *See id.*, at 84-86. The dissenting judge trenchantly observed that the majority had offered only "a slogan, not an argument." *See id.*, at 90 (Lynch, J., dissenting). He noted:

> The majority fails to cite any actual evidence, in the language or legislative history of the DBA, that Congress intended to prevent state law contract suits based on contractual promises to pay DBA prevailing wages - promises that Congress specifically required to be written into contracts that it must have assumed would be enforceable, like any other contracts, under state law.
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> * * *
>
> So what justifies interpreting a remedial statue enacted for the benefit of workers as containing an implicit shadow agenda - not

[1] *See Operating Engineers Health and Welfare Trust Fund v. JWJ Contracting Co.*, 135 F.3d 671, 676 (9th Cir. 1998); *Weber v. Heat Control Co.*, 728 F.2d 599, 600 (3rd Cir. 1984); and *United States v. Capeletti Bros., Inc.*, 621 F.2d 1309, 1317 (5th Cir. 1980).

> reflected in any statutory language or legislative history - to preclude state law causes of action that would enforce contractual promises to comply with federal law?
>
> Because the majority opinion does not provide a sufficient answer, I dissent. *Id.*, at 90-91 (emphasis added)
>
> In sum, there is no judicial consensus for denying common law actions, as ARC suggests in its Petition.[2] The manifest weight of the legal arguments that are marshaled in *Grochowski* support the Montana court's position.

D. **"[T]his Court expressly declined to do what the Montana Supreme Court's decision has done."** (Pet., p. 14) Petitioner contends that the Montana court's holding is in conflict with *Universities Research Ass'n, Inc., v. Coutu*, 450 U.S. 754 (1981). In fact, the Montana court expressly followed *Coutu* in declining to consider whether the Davis-Bacon Act creates a private right of action. (*See* Pet., App. 29, ¶ 54) *Coutu* does not even mention the question at issue in the present case - - whether the Davis-Bacon Act preempts state common-law rights of action.

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[2] The sole state case cited by ARC, *Davis v. Hardaway Contracting Co.*, 386 S.W.2d 707 (Ark. 1965) is highly unanalytic. It seems to deny a right of action on preemption grounds, but cites none of this Court's preemption cases and does not apply its traditional preemption tests. *See Pennsylvania v. Nelson*, 350 U.S. 497, 502-505 (1956) (articulating three-factor test).

III. THE MONTANA SUPREME COURT'S DECISION IS STRICTLY LIMITED AND BASED HEAVILY ON ESTOPPEL.

Besides the considerations above, this case is too narrow to be suitable for this Court's certiorari docket. The Montana Supreme Court stressed that "[t]his decision is limited to the named Petitioners/Appellants . . . we render no ruling as to other potential claimants." (Pet. App., 29, ¶ 55)

Among other matters, the Montana court laid emphasis on estoppel as a dispositive point in the case. It stressed repeatedly that ARC had failed to challenge the USAF/DOL wage ruling underlying the workers' claim. (*See* Pet App., 11-17, ¶¶ 19, 21, 23, 24, 31)

These elements make the case unsuitable as a vehicle for weighing and determining large issues. If this Court wishes to address large questions of federalism in the context of the Davis-Bacon Act, it will certainly be presented with cases more broadly reasoned and less complicated by estoppel issues.

CONCLUSION

The Montana Supreme Court's analysis of the issues in this matter was correct. Its decision, moreover, was narrowly focused and heavily grounded in estoppel. This case is unsuitable for this Court's certiorari docket, and the Petition should be denied.

Respectfully submitted,

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